Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ARMSTRONG SURGICAL CENTER, INC.,
Petitioner,

v.

ARMSTRONG COUNTY MEMORIAL HOSPITAL; ROGELIO BORJA; RICHARD BOSCO; ZAFAR CHOWDHRY; JEFFREY DAVID; FRANK DAVIE; EGBERT DEVRIES; PAUL L. FREDERICK; JOHN GARROTT; FRANK N. GENOVESE; IRVING KLEIN; DAVID H. KOHL; LEE H. KOSTER; JOHN MARTY; MICHAEL P. ONDICH; KARL R. SALTRICK; WILLIS SHOOK; ANTHONY SMALDINO; PETER SOTOS; JAE T. YANG,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the *Noerr-Pennington* doctrine extend antitrust petitioning immunity to financially interested private parties for their deliberate antitrust violations and fraudulent misrepresentations made in state adjudicatory proceedings?

2. Does the "State Action" doctrine of *Parker v. Brown* immunize financially interested private parties for their deliberate antitrust violations where the state has not provided any active supervision of the anticompetitive conduct?

3. Do conflicting decisions of the Circuit Courts and conflicting decisions of this Court on the question of *Noerr-Pennington* immunity in adjudicatory proceedings and on the question of State Action immunity present proper matters for review by the Supreme Court?

PARTIES TO PROCEEDING

The caption to this case contains a list of all the parties to this proceeding. Petitioner is a Pennsylvania corporation. There is no parent or subsidiary company of Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Armstrong Surgical Center, Inc., respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Third Circuit to review the judgment of that divided Court dated August 30, 1999, which denied Petitioner's Petition for Rehearing, and which affirmed the judgment and order of the United States District Court for the Western District of Pennsylvania in favor of the Respondents herein, dismissing the

Petitioner's complaint which pleaded, *inter alia,* antitrust violations.

OPINIONS BELOW

The opinion of the District Court is not reported, but is reprinted in the Appendix to this petition at App., p. 51a. The opinion of the United States Court of Appeals for the Third Circuit is not as yet reported, but is reprinted in the Appendix to this petition at App., p. 1a. The denial of Petitioner's Petition for Rehearing en banc is not reported, but is reprinted in the Appendix to this petition at App., p. 85a.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1). The United States Court of Appeals for the Third Circuit issued its Decision in this case on July 27, 1999. A rehearing en banc was timely requested. Rehearing en banc was denied on August 30, 1999. This Petition was timely filed within 90 days of the rehearing en banc denial, and is thus timely.

STATEMENT OF THE CASE

This case presents criterial issues regarding the extent to which *Noerr-Pennington* and *Parker v. Brown* provide immunity from the federal antitrust laws for deliberate misrepresentations, concerted activities and other antitrust violations made by financially interested private parties whose sole purpose for engaging in these illegal activities was to influence the outcome of an adjudicatory proceeding to protect their existing monopolies.

In addition, we counsel for Petitioner, express a belief, based on reasoned and professional judgment, that the decision below of a divided Third Circuit conflicts with decisions of other Circuit Courts and with the following decisions of this Court:

Ticor Title Insurance Co. v. Federal Trade Commission, 504 U.S. 621 (1992)

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991)

Federal Trade Commission v. Superior Court Trial Lawyers Assn., 493 U.S. 411 (1990)

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988)

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)

Patrick v. Burget, 486 U.S. 94 (1988)

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)

and conflicts directly with the decision of the United States Court of Appeals for the Fourth Circuit on which this Court denied certiorari in *State of North Carolina, ex. rel. Rufus L. Edmisten, Attorney General v. P.I.A. Ashville, Inc.*, 740 F.2d 274 (4th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985).

Petitioner seeks review of a decision of a divided United States Court of Appeals for the Third Circuit, affirming a decision by the United States District Court for the Western District of Pennsylvania (Diamond, J.) that dismissed an antitrust complaint.[1] The complaint charged that Respondents violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as follows:

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[1] The standard for review stated by the Third Ciircuit is accepting as true all factual allegations contained in the Complaint and all reasonable inferences to be drawn therefore, citing *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, (3d Cir.), *cert. denied*, 118 S.Ct. 435 (1997).

Petitioner applied in 1991 to the Pennsylvania Department of Health ("Department") for a Certificate of Need ("CON") to construct and operate a free-standing Ambulatory Surgery Center ("ASC") in Armstrong County, Pennsylvania. The only medical facility in the relevant market area was, and is, the Respondent Hospital ("Hospital").

The Hospital had a relevant market area monopoly (100%) in providing operating room services. The 19 Respondent Physicians ("19 Physicians") had a relevant market area monopoly (90%) in providing surgical services.

To preserve their monopolistic status quo, all Respondents, acting in concert, targeted with their deliberate misrepresentations and illegal boycott of the Petitioner's ASC, the two criteria which the Department considers in reviewing the grant of a CON application: (1) the basic need for the facility; and (2) its prospective economic viability. To eliminate basic need, the Hospital created a "phantom" Hospital ASC which would make the Petitioner ASC duplicative. To destroy the economic viability of the proposed Petitioner ASC, and therefore any need for it, the 19 Physicians conspired and agreed to boycott the Petitioner ASC and to use only the newly created "phantom" Hospital ASC.

In October and November 1993, the Hospital deliberately misrepresented to the Department the information that the Hospital ASC was either built or would be soon available for use and introduced 19 substantially identical letters on Hospital stationery from the 19 Physicians stating that they would not use the Petitioner ASC, but would only use the Hospital ASC, which did not exist. The Hospital and the 19 Physicians did not disclose that the

Hospital ASC would not be built if the CON for the Petitioner ASC was denied. The letters introduced as evidence, in which each Physician misrepresented that the Hospital's ASC was in existence and stated:

> "I do not intend to perform surgery at the proposed Armstrong Surgical Center. I intend to use the services of the Ambulatory Surgery Center at Armstrong County Memorial Hospital. The hospital's Ambulatory Surgical Center provides the highest quality medical care at the most reasonable cost.
>
> I recommend that you do not grant a Certificate of Need to the proposed Armstrong Surgical Center because it is unnecessary. It duplicates services already provided, and it is not cost effective."

On November 29, 1993, the Department disapproved the application. Petitioner appealed that disapproval to the Pennsylvania State Health Facility Hearing Board ("Board") which after hearing, found on March 13, 1996 that the CON should be denied. (The Board's opinion is set forth at App., p. 102a.)

The Board's decision specifically relied on the deliberate misrepresentation that the Hospital ASC was or would be built and the threat of a boycott and thus Petitioner ASC would not be economically viable because the 19 Physicians who performed nearly all surgeries in the area would not use Petitioner's ASC. Emphasizing the damaging effect of the 19 Physicians boycott on the Petitioner's application, the Board said at App., pp. 115a-116a:

> ". . . the most damaging evidence is that the number of physicians who might have been expected to support the facility decreased significantly after the Applicant had submitted its projections. . . . The nineteen physicians who opposed the project in writing

> are responsible for appoximately 90 percent of all surgery performed at the Hospital and each is on the Hospital's staff."

Petitioner subsequently appealed the Board decision to the Commonwealth Court of Pennsylvania, which affirmed the Board decision on January 27, 1997, stating that it was based on "substantial evidence," the limit of its review in that appeal. (The Court's opinion is set forth at App., p. 87a.)

Because the state proceedings were not the proper forum for federal antitrust proceedings, Petitioner filed this antitrust action while the state proceedings were pending, seeking treble damages for, *inter alia*, denial of the CON, lost value of the CON and the proposed ASC, and lost profits. The District Court dismissed Petitioners' suit for failure to state a claim upon which relief may be granted under Fed.R.Civ.P. 12(b)(6) holding erroneously that the Respondents' conduct was immune from antitrust scrutiny under the "State Action" doctrine of *Parker v. Brown* and the *Noerr-Pennington* immunity doctrine. On August 11, 1997, Petitioners filed an appeal to the Third Circuit and on July 27, 1999, the Third Circuit filed an Opinion in this case (App., p. 1a) wherein the majority of the panel affirmed the District Court's order dismissing Petitioner's Complaint for failure to state a claim upon which relief may be granted. The majority rested its decision on two grounds: (1) Petitioner's injuries resulted from State Action and that "antitrust liability" cannot be imposed on a private party who induced State Acion by means of concerted anticompetitive behavior; and (2) that based on *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) ("*Omni*"), the Respondents enjoyed *Noerr-Pennington* immunity. A dissent filed by Schwartz, J. argued that: (1) the misrepresentation exception to

Noerr-Penington destroyed Respondents' immunity; (2) *Omni* was not applicable because it applied only to misrepresentations made in the political context as opposed to the administrative or adjudicative context; and (3) the Respondents are not entitled to a "State Acion" defense.

Petitioner then unsuccessfully petitioned the Third Circuit to rehear the case *en banc*. Four Judges dissented. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. *NOERR-PENNINGTON* PETITIONING IMMUNITY DOES NOT EXTEND TO FINANCIALLY INTERESTED PRIVATE PARTIES WHO INTRODUCE DELIBERATE MISREPRESENTATIONS AND OTHER ANTITRUST VIOLATIONS INTO ADJUDICATORY PROCEEDINGS.

Petitioning immunity, often called *Noerr-Pennington*, is based on the right to petition government for redress. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 657 (1965), a case involving legislative activities, held that: ". . . the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their interest in doing so." *Noerr*, 365 U.S. at 139.

This Court has not clearly held that the *Noerr-Pennington* immunity extends to misrepresentations made in adjudicatory proceedings. However, this Court and others have distinguished between misrepresentations made in adjudicative proceedings as opposed to legislative petitioning.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), after reviewing a number

of forms of illegal and reprehensible practice (pages 512-513), this Court concluded at page 513:

> "There are many other forms of illegal and reprehensible practices which may corrupt the administrative or judicial processes and which may result in antitrust violations. *Misrepresentations*, condoned in the political arena, are not immunized when used in the adjudicatory process. . ." [Emphasis added.]

Potters Medical Center v. City Hospital Association, 800 F.2d 568 (6th Cir. 1986) followed *California Motor Transport*, saying at page 578:

> "California Motor Transport recognized that 'unethical conduct in the setting of the adjudicatory process' or the pursuit of 'a pattern of baseless, repetitive claims' is unprotected by the Noerr-Pennington doctrine; such conduct 'constitutes an abuse of [governmental] processes . . . effectively barring a competitor's meaningful access to the courts or agencies.' 404 U.S. at 512-13, 92 S.Ct. at 612-13; accord Otter Tail Power Co. v. United States, 410 U.S. 366, 330, 93 S.Ct. 1022, 1030, 35 L.Ed.2d 359 (1973)."

And in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), this Court at pages 499-500, stated that unethical and deceptive practices in "less political arenas, such as administrative as judicatory settings, could violate the antitrust laws."

The Third Circuit majority relied heavily on *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), to support its conclusion that there is no misrepresentation exception to the *Noerr-Pennington* immunity. Such reliance is simply wrong. *Omni* reaffirmed that deliberate misrepresentations in the *legislative* arenas" . . . reprehensible as [they are], can be of no consequence so far as the Sherman Act is concerned," 499 U.S. at

384, holding that the defendant was not liable for petitioning the City of Columbia to enact zoning ordinances which had a detrimental effect on the plaintiff, a competitor.

Our case here involves an adjudicative proceeding, including the Pennsylvania Commonwealth Court.

Two years after *Omni*, this Court decided *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993), and in its opinion, this Court stated at 508 U.S. at 61 n.6:

> "In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport*, 404 U.S., at 512-513, 92 S.Ct., at 613. We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. . ."

In the absence of clarification both before and after *Omni* on *Noerr-Pennington* immunity, the decisions in the Circuit Courts conflict, particularly with the decision of the Third Circuit in this case.

The Third Circuit majority's decision conflicts with holdings in several circuits that have held that *Noerr-Pennington* does not immunize misrepresentations made in administrative or adjudicative proceedings, including its own recent decision in *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 124 (3d Cir. 1999) holding that material representations in an adjudicative arena are not

protected by *Noerr-Pennington* immunity; *Whelan v. Abell*, 48 F.3d 1247, 1255 (D. C. Cir. 1995), holding that if a sham claim involves administrative agencies, Noerr does not protect ". . . petitions based on known falsehoods . . ."; *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972), stating: "No actions [efforts to deceive the Food and Drug Administration] which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption."; and *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983), wherein the Ninth Circuit court stated (690 F.2d at 1261):

> "There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws."

And in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998) ("*Kottle*"), a Certificate of Need ("Con") proceeding wherein the Ninth Circuit set forth three "sham" exceptions, the third being misrepresentations before an administrative agency which deprive the proceedings of its legitimacy.

The Third Circuit majority admits that its decision is in conflict with, in addition to *Kottle*, the circuit court decisions in *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986) and *Potters Medical Center, supra* (see footnote 7 of the Third Circuit majority opinion, App., p. 19a).

In addition to the above, the majority of the Third Circuit erred in refusing to follow *Federal Trade Commission v. Superior Court Trial Lawyer's Association*, 493 U.S. 411 (1990) (*"Trial Lawyers"*). In *Trial Lawyers*, this Court held that a boycott for the specific purposes of influencing governmental action to increase fees paid to the boycotting lawyers was not protected by the *Noerr-Pennington* doctrine because the boycott was itself illegal. It further held the illegal boycott was not immunized because it became part of a governmental proceeding fixing the fees. This Court said, on page 425:

> "Indeed, respondents' theory of Noerr was largely disposed of by our opinion in Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988). We held that the Noerr doctrine does not extend to 'every concerted effort that is genuinely intended to influence governmental action.'" 486 U.S., at 503 S.Ct., at 1938.

We explained:

> "If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-563 [, 65 S. Ct. 716, 725-729, 89 L.Ed. 1051] (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government to agree to the conspirators' terms. But see Georgia v. Evans, 316 U.S. 159 [62 S.Ct. 972, 86 L.Ed. 1346] (1942). Firms could claim immunity for boycotts or horizonal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action." *Ibid.*

In our case, the Respondents' objectives were similar to those of the boycotting lawyers, as the Hospital's and the 19 Physicians' motives were to preserve their high fees and revenue structure at the expense of the public and Petitioner. In other words, as stated by this Court in *Trial Lawyers* at page 425:

> "It of course remains true that 'no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws,' id., at 135, 81 S.Ct., at 528, even if the defendants' sole purpose is to impose a restraint upon the trade of their competitors, id., at 138-140, 81 S.Ct., at 530-531. But in the Noerr case the alleged restraint of trade was the intended consequence of public action; in this case the boycott was the means by which respondents sought to obtain favorable legislation."

The holding of this Court in *Trial Lawyers*, so similar to our case, is a confirmation of statements enunciated in so many cases—that an egregious violation of the antitrust laws by financially interested private parties is not immunized just because it is introduced as evidence at some later time to influence action by a governmental body—especially if it is an adjudicative body. The Third Circuit majority states (App., p. 10a) that the limitation on Noerr immunity recognized in *Trial Lawyers* is inapplicable to an injury that is caused directly by government action that the private defendant helped to secure. It has misread *Trial Lawyers*.

We urge this Court to grant our Petition and make it crystal clear that *Noerr-Pennington* does not protect those who would corrupt administrative or adjudicative proceedings for their own financial gain by making deliberate misrepresentations and introducing false testimony for the purpose of poisoning the outcome of the proceedings.

II. STATE ACTION IMMUNITY FAILS BECAUSE THERE IS NO ONGOING STATE SUPERVISION OF ANTICOMPETITIVE CONDUCT.

The decision of the Third Circuit is in direct conflict with this Court's decisions in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980) ("*Midcal*"), *Patrick v. Burget*, 486 U.S. 94 (1988) ("*Patrick*") and *Ticor Title Insurance Co. v. Federal Trade Commission*, 504 U.S. 621 (1992) ("*Ticor*"), because an essential ingredient of State Action immunity is totally missing, i.e., active state supervision of anticompetitive conduct of the financially interested private parties. None of these cases were discussed in the Third Circuit's opinion on the State Action immunity issue.

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, supra, this Court held that the two standards must be met for private parties to enjoy antitrust immunity under *Parker v. Brown* are (at page 105):

> "These decisions establish two standards for antitrust immunity under Parker v. Brown. First the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.). The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for Parker immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair

> trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As Parker teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .' 317 U.S., at 351, 63 S.C., at 314. [Footnotes 8 and 9 omitted.]

This Court approved the *Midcal* test in *Patrick*. In *Patrick*, private physicians allegedly abused a state-sanctioned peer review process by denying hospital privileges to doctors associated with competing health clinics. This Court, in holding against the physicians, stated that the purpose of the active supervision requirement was to protect conduct that furthered the state's clearly articulated interests, while leaving the federal antitrust law to deal with activities undertaken for mere private gain or interest.

And in *Ticor*, supra, the private parties were charged with horizonal price fixing, and, as in this case, did not dispute the substance of the allegations. They mistakenly relied, as in this case, on the State Action defense to protect them from liability. *Ticor* holds not only that State Action immunity for private parties requires a showing that: (1) the state has articulated a clear and affirmative policy to allow the anticompetitive conduct; and (2) the state provides actual supervision of anticompetitive conduct undertaken by private parties, but also requires a showing that any regulatory or other regime established to provide such active supervision is effective in practice in doing so. This Court, quoted from its opinion in *Patrick* at pages 633-634:

> "The active supervision requirement stems from the recognition that where a private party in engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interest of the state. . . . The requirement is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the state, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the state exercise ultimate control over the challenged anticompetitive conduct. . . . The mere presence of some state involvement or monitoring does not suffice. . . . The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.' U.S. at 100-101, 108 S.C., at 1663 (internal quotation marks and citations omitted)."

As this Court in considering State Action immunity for private parties in *Midcal, Patrick* and *Ticor* has noted, state permitted anticompetitive conduct by private parties will be tolerated only if the state exercises such active supervision as will, and in fact does, prevent undue injury to those affected by the anticompetitive conduct it has permitted.

The state involvement here clearly stops short of protecting the public. The anticompetitive conduct of private parties permitted by the denial of the CON for a competitor is, in the case of the Hospital here, a monopoly in providing operating rooms in the area, which permits it

to price its services as a monopolist without any price competition. In the case of the 19 Physicians, the anti-competitive conduct is their ability, through monopolization and control of use of the Hospital operating rooms, to limit or exclude other physicians from using the only operating rooms in the relevant market area and to continue to charge hospital rather than outpatient surgery rates. The active supervision required by *Midcal*, *Patrick* and *Ticor* must target and deal effectively with those specific problems. The Pennsylvania CON law provided for no such active supervision. Had it done so, for example, the Pennsylvania authorities would have known that the Hospital did not then and has not since built its outpatient surgical center, even though the Hospital and the 19 Physicians represented in their letters introduced as evidence that the outpatient surgical center existed.

Any doubt that the reasoning of the Third Circuit in this matter is incorrect is resolved by *State of North Carolina, ex. rel. Rufus L. Edmisten, Attorney General v. P.I.A. Ashville, Inc.*, 740 F.2d 274 (4th Cir. 1984), *cert. denied*, 471 U.S. 1003. *There it was held* that under the North Carolina Certificate of Need (CON) program, essentially similar to that of Pennsylvania, *the second State Action immunity prong, active supervision, was absent and accordingly the defendant could not claim the benefit of State Action immunity in antitrust action* (emphasis added). As in Pennsylvania, the North Carolina CON program was enacted because the National Health Planning and Resources Development Act of 1974 (NHPRDA), 42 U.S.C. § 300k, *et seq.*, required states to pass Certificate of Need legislation or risk losing federal funds. North Carolina, like Pennsylvania, did so. *P.I.A.* obtained a CON for an acquisition and, when challenged for antitrust violations, argued that State Action immunity bars the antitrust claim. The Fourth Circuit

held that the State Action immunity doctrine, explained in *Parker v. Brown*, 317 U.S. 341 (1943), was not applicable. The Court, citing *Midcal*, went on to say at page 277:

> "To qualify for state action immunity, a claimant must show two things. One is that there be a 'clearly articulated state policy.' The second part of the state action immunity two-part test, as set forth in Midcal, is that the statutory scheme, here the certificate of need review provision, be subject to *ongoing* state supervision."

And on page 278, the Court held:

> "An examination of the North Carolina certificate of need program shows that after a proposed acquisition passes certificate of need review, the states makes no attempt to monitor the use of the acquisition, *see*, N.C.Gen.Stat. § 131-175 to 131-187. There is no active supervision at all. No provision, for example, regulates post-acquisition prices. The state does provide for penalties for failure to obtain a certificate of need in situations where one is required, and for failure to incur a financial obligation authorized by a certificate of need. But the statute in no way attempts to monitor the conduct of health care providers to be sure it is in harmony with the expressed goals of the NHPRDA, and with the Findings of Fact in the North Carolina legislation."

The issues there were extensively briefed to this Court in connection with a Petition for a Writ of Certiorari, not only by the parties but also by the United States in an Amicus Curiae brief filed by the Solicitor General in support of the Fourth Circuit's decision, which quotes *Midcal* (445 U.S. at 106), "the national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private

price fixing arrangement." See Transcript of Records and File Copies of Brief, 1984, 84-480, etc., U.S. Supreme Court Library, (Quote at Amicus Curiae Brief, page 15). This Court denied certiorari to the hospital which claimed immunity.

We submit that the very language of the opinion quoted above is applicable to our case before this Court and settles this issue of the applicability here of State Action immunity and the two-prong test of *Midcal*, *Patrick* and *Ticor*. Since *State of North Carolina* did not find State Action immunity on facts essentially identical to ours here, the Third Circuit majority is in error here.

Faced with the overwhelming case law from this Court on this issue, the Third Circuit, without citing or attempting to distinguish *Midcal*, *Patrick* or *Ticor*, stated that this Court's reasoning in *Omni* was dispositive of this issue. The Third Circuit misread *Omni*. The State Action immunity issue in *Omni* was whether or not a municipality, a political subdivision, and not a private party, was immunized by the *Parker* doctrine. This Court held that the *Parker* defense was available to a municipality, *not a private party* (emphasis added), if there was a clear articulation of a state policy to authorize anticompetitive conduct—prong one of the *Midcal*, *Patrick* and *Ticor* test. In the instant case, Respondents are financially interested private parties and the *Parker* immunity analysis by the Third Circuit of *Omni* is simply wrong because the applicability of the second prong of *Midcal*, *Patrick* and *Ticor* was completely ignored by the Third Circuit in its opinion and clearly was not satisfied by the Commonwealth of Pennsylvania. There is no ongoing "active supervision" of anticompetitive conduct by the Commonwealth of Pennsylvania under its CON laws. In fact, after a CON is granted or denied, there is no attempt by Pennsylvania to monitor whether or not the parties involved

are engaging in any anticompetitive activities. Since there is no active supervision, the State Action immunity defense of Respondents must fail. Petitioner prays that this Court will provide the "active supervision" of Respondents' illegal conduct by granting Certiorari.

III. THE THIRD CIRCUIT DIVIDED OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER CIRCUIT COURTS.

As we have pointed out at page 3 hereof, the divided opinion of the Third Circuit conflicts directly with seven decisions of this Court, all of which are listed at page 3 hereof and which have been discussed herein, and with eight Circuit Court decisions which have been discussed at pages 9, 10 and 16 herein.

We submit certiorari is appropriate under Rules 10(a) and 10(c) of this Court to resolve the conflicts in the Circuit Courts, and conflicts with decisions of this Court on the issues presented herein.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Filed July 27, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3440

ARMSTRONG SURGICAL CENTER, INC.,
Appellant,
v.

ARMSTRONG COUNTY MEMORIAL HOSPITAL; ROGELIO BORJA; RICHARD BOSCO; ZAFAR CHOWDHRY; JEFFREY DAVID; FRANK DAVIE; EGBERT DEVRIES; PAUL L. FREDERICK; JOHN GARROTT; FRANK N. GENOVESE; IRVING KLEIN; DAVID H. KOHL; LEE H. KOSTER; JOHN MARTY; MICHAEL P. ONDICH; KARL R. SALTRICK; WILLIS SHOOK; ANTHONY SMALDINO; PETER SOTOS; JAE T. YANG

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 96-01384)
District Judge: Honorable Gustave Diamond

ARGUED APRIL 23, 1998

BEFORE: NYGAARD and STAPLETON, Circuit Judges
and SCHWARTZ,* *District Judge.*

(Filed July 27, 1999)

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* Honorable Murray M. Schwartz, Senior Judge for the United States District Court for the District of Delaware, sitting by designation.

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Appellant Armstrong Surgical Center, Inc. (the "Surgical Center") contends that Armstrong County Memorial Hospital and nineteen of its staff physicians (the "Hospital Defendants") conspired to prevent it from establishing an ambulatory surgery center, thereby restraining and monopolizing trade in violation of sections 1 and 2 of the Sherman Act. The District Court dismissed the complaint after concluding that the alleged conduct was immune from antitrust scrutiny. We will affirm.

I.

We review the District Court's order dismissing the Surgical Center's complaint *de novo*. *See Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 277 (3d Cir. 1996). In reviewing that order, we employ the same standard the District Court used, accepting as true all factual allegations contained in the complaint and all reasonable inferences that can be drawn therefrom. *See Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 411 n.2 (3d Cir.), *cert. denied*, 118 S. Ct. 435 (1997).

II.

The Surgical Center has plans to build a free-standing ambulatory surgery center in the city of Kittanning, Armstrong County, Pennsylvania. If constructed, that facility would provide outpatient surgical services, including both general surgery and various specialties. Currently, the Hospital is the only facility with operating rooms in Armstrong County, and the nineteen staff physician defendants

perform the vast majority of surgeries in the county. Only one independent ambulatory surgery center operates in the four counties that border Armstrong County, and this center is approximately fifty miles from the Surgical Center's proposed site. If constructed, the Surgical Center's facility would compete directly with the Hospital, and its staff physicians in the outpatient surgery market. Moreover, the Surgical Center alleges that it would offer outpatient surgical services at prices significantly lower than the Hospital's.

Under the Pennsylvania Health Care Facilities Act, anyone proposing to establish a new health care facility must first obtain a Certificate of Need ("CON") from Pennsylvania's Department of Health. *See* Pa. Stat. Ann. tit. 35, § 448.701(a)(2). The Act seeks to ensure "the orderly and economical distribution of health care resources to prevent needless duplication of services." *Id.* at § 448.102. The Department individually reviews CON applications in an extensive proceeding consisting of an investigation, an evaluation of submitted materials, and a public hearing. During this review, the Department considers various health planning issues, including the adequacy of existing health care providers and the need for additional services or facilities. *See id.* § 448.707. Interested parties, including health care providers who supply similar services in the area, may petition for public meetings or hearings and submit information to the Department on any CON applicaton. *See id.* §§ 448.103, 448.704(b).

In Marfch of 1991, the Surgical Center filed an application for a CON with the Department as required. Thereafter, according to the Surgical Center's complant, the Hospital defendants, including fourteen physicians who originally supported the Surgical Center's project, entered

into a conspiracy to subvert establishment of the new facility. The alleged conspiracy involved: (1) the physicians announcing that they would boycott the proposed outpatient center and (2) the Hospital defendants submitting false and misleading information to the Department. Specifically, the Surgical Center alleges that the Hospital defendants informed the Department that its nineteen physicians would not use the Surgical Center facility in the hope that this information would convince the Department that the proposed facility could not meet the statutory requirements for a CON. In addition, the Surgical Center claims that the Hospital defendants sought to mislead the Department into believing that the Hospital intended to open its own outpatient center, which was then under construction, and that this facility would satisfy all of Armstrong County's outpatient surgery needs. The Hospital's partially constructed facility was designed to provide alternative space for outpatient surgeries then conducted in three of the Hospital's six mixed-use operating rooms. According to the Surgical Center, however, the Hospital defendants knew that the construction of the Hospital's facility had been stopped with only the shell of the building completed and that the Hospital had made no commitment to resume construction. Despite this knowledge, it is alleged that the Hospital defendants falsely represented to the Department that its new center was either in use or very near completion.

The Department denied the Surgical Center's CON application. The Surgical Center appealed that decision to the Commonwealth of Pennsylvania State Health Facility Hearing Board, which conducted its own hearing and received additional evidence.[1] The Board affirmed the

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[1] The Act of Feb. 23, 1996, P.L. 27, 1996 Pa. Laws 10, § 9(a) (repealing Pa. Stat. Ann. tit. 35, §§ 448.501-448.507), has since

Department's decision after finding that (1) the Surgical Center's facility would result in needless duplication of existing facilities and health care services, and (2) the Surgical Center would not be economically viable because the nineteen Hospital surgeons who performed ninety percent of Armstrong County's surgeries would not use the Surgical Center facility. According to the Board, "the most damaging evidence [against the Surgical Center's application] is that the number of physicians who might have been expected to support the facility decreased significantly after the Applicant had submitted its projections." The Surgical Center appealed the Board's decision to the Commonwealth Court of Pennsylvania, which affirmed the Board's decision.

The Surgical Center filed this antitrust action seeking treble damages for, *inter alia*, denial of the CON, lost value of the CON and the proposed outpatient center, and lost profits. It contends that the Hospital defendants' conspiracy caused the Department to deny its CON application. The District Court dismissed the Surgical Center's suit for failure to state a claim upon which relief may be granted, *see* Fed. R. Civ. P. 12(b)(6), holding that the Hospital defendants' conduct was immune from antitrust scrutiny.

III.

We begin by considering the Surgical Center's claim that the Hospital defendants conspired to boycott its outpatient center, thereby violating sections 1 and 2 of the Sherman Act. To state a claim under section 1, a plaintiff must allege "a contract, combination or conspiracy; a restraint of trade; and an effect on interstate commerce."

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eliminated the Health Facility Hearing Board and transferred its review functions to the Health Care Policy Board. This change does not affect our review of the Surgical Center's appeal.

Fuentes v. South Hills Cardiology, 946 F.2d 196, 201 (3d Cir. 1991). Section 2 of the Sherman Act prohibits both monopolies and attempts to monopolize. *See* 15 U.S.C. § 2. A claim under section 2 must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91 (1993); *see also Schuylkill Energy Resources*, 113 F.3d at 413.

"A classic boycott involves concerted action with a purpose either to exclude a person or group from the market, or to accomplish some other anticompetitive object, or both." *Fuentes*, 946 F.2d at 202 (internal quotes omitted); *see also St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541, 98 S. Ct. 2923, 2929-90 (1978). Such commercially motivated group boycotts, or concerted refusals to deal, generally are considered illegal per se under section 1. *See F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 431-32, 110 S. Ct. 768, 779-80 (1990); *Weiss v. York Hospital*, 745 F.2d 786, 818 (3d Cir. 1984). When a boycott's aim is to monopolize trade, it might also violate section 2. *See Retina Associates v. Southern Baptist Hosp. of Fla., Inc.*, 105 F.3d 1376, 1384 (11th Cir. 1997).

The Hospital defendants do not deny that the complaint alleges a threat of a boycott that might under other circumstances constitute an antitrust violation. They insist, however, that the complaint alleges facts establishing that they are immune from antitrust liability. Specifically, they contend that their activities are insulated from antitrust scrutiny because their allegedly wrongful conduct occurred in the context of supplying information to the Pennsylvania Department of Health during the Surgical

Center's CON application process and because the injuries alleged resulted solely from the Department's denial of the CON.

In *Parker v. Brown*, 317 U.S. 341 (1943), an agricultural producer challenged a marketing program adopted by California's Director of Agriculture as invalid under the Sherman Act. The program served to restrict competition among growers and maintain prices in commodity distribution. "Relying on principles of federalism and state sovereignty, [the Supreme Court held] that the Sherman Act did not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991).

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Supreme Court held that antitrust liability cannot be predicated solely on petitioning to secure government action even where those efforts are intended to eliminate competition. As the Court explained in *Noerr*, "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their interest in doing so." *Noerr*, 365 U.S. at 139.

The *Parker* doctrine and the *Noerr-Pennington* doctrine have been interpreted as complementing each other to protect the two related but distinct principles upon which they are founded. As the Supreme Court has more recently observed:

> *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States'

> acts of governing, and the latter the citizens' participation in government.

Omni, 499 U.S. at 383.

As the Surgical Center emphasizes, however, the immunity afforded to a private party under *Noerr* is not unlimited. Where the challenged private conduct is only "sham" petitioning—i.e., where it "is not genuinely aimed at procuring favorable government action as opposed to a valid effort to influence government action"—*Noerr* immunity is not available. *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. 49 (1993) (*"PRE"*). In essence, sham petitioning entails "the use of the government *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *PRE*, 508 U.S. at 61 (emphasis added). Accordingly, the sham petitioning exception does not apply in a case like the one before us where the plaintiff has not alleged that the petitioning conduct was for any purpose other than obtaining favorable government action.[2]

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[2] Plaintiff's allegations that both the threatened boycott and the claimed misrepresentations were intended to secure denial of the CON distinguish the situation before us from cases like *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999), that deal with the "sham" exception to the *Noerr* doctrine. In *Cheminor*, the defendant, Ethyl, had petitioned the International Trade Commission and the Department of Commerce, alleging that Cheminor was dumping bulk ibuprofin on the U.S. market and seeking the imposition of extra duties to offset the alleged subsidies that enabled it to do so. Although Cheminor withdrew from the U.S. market prior to a final decision on Ethyl's petition, it alleged injuries resulting from the petition and brought an antitrust suit against Ethyl. In response to Ethyl's reliance on *Noerr* immunity, Cheminor asserted that the petition was a "sham" and *Noerr* immunity thus was unavailable. We analyzed and rejected Cheminor's argument under the teachings of *PRE*.

PRE holds that *Noerr* immunity is lost when the petition is a "sham," *i.e.*, "is not genuinely aimed at procuring favorable gov-

It is also true that a private party can be held liable even for bona-fide petitioning conduct where that conduct has caused direct antitrust injury in the market place. *F.T.C. v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411 (1990). In *Trial Lawyers*, for example, the public defenders of the District of Columbia engaged in a concerted refusal to represent indigent defendants in order to pressure the District into raising the hourly rate paid. The Court held that the defendants could be held liable under the Sherman Act for injuries that resulted directly

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ernment action." *PRE*, 508 U.S. at 58. As we noted in *Cheminor*, *PRE* further holds that determining whether a petition is a sham requires a two-step process. First, the Court determines whether the petition is "objectively baseless;" if not, the petition is not a sham without regard to the subjective intent of the petitioner. Second, if the petition is objectively baseless (and only if it is objectively baseless), the Court is to look to the petitioner's "subjective motivation" and determine "whether the baseless [petition] conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of governmental *process* —as opposed to the *outcome* of that process—as an anticompetition weapon." 508 U.S. at 60-61 (emphasis in original) (quoting *Noerr*, 365 U.S. at 144, and *Omni*, 499 U.S. at 380).

Cheminor holds that where the petitioning effort allegedly involves misrepresentations, the Court, at the first step, must "determine whether [the] petition was objectively baseless under [*PRE*] *without regard to those facts that the [plaintiff] alleges [the petitioner] misrepresented.*" *Cheminor*, 168 F.3d at 123 (emphasis in original). Such a determination is unnecessary here, however, because the plaintiff affirmatively alleges that defendants' purpose was to secure the *outcome* of the process—denial of the CON. Thus, even if defendants' opposition to the CON were found to be objectively baseless (a conclusion that could not be reached on this record), defendants would pass the second, "subjective" test and the sham exception to *Noerr* immunity would be inapplicable here.

While *Cheminor* focuses on the sham exception to *Noerr* immunity, it also rejects Cheminor's more general argument that "*Noerr-Pennington* immunity does not apply at all to petitions containing misrepresentations." *Id.* To that extent, it supports the conclusion reached below with respect to the misrepresentation claim.

from the boycott, even though the boycott was intended to secure government action.

The limitation on *Noerr* immunity recognized in *Trial Lawyers* is inapplicable, however, to a case where the sole antitrust injury is caused directly by the government action that the private defendant has helped to secure. Thus, even where the same petitioning conduct might give rise to antitrust liability for injury *directly* caused to a competitor in the marketplace, if relief is sought solely for injury as to which the state would enjoy immunity under *Parker*, the private petitioner also enjoys immunity. As the Supreme Court explained in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*:

> Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by [*Noerr*, *Pennington*, and *California Motor Transport Co. v. Trucking Unlimited*]. The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

486 U.S. 492, 499 (1987) (citations omitted) (quoting *Noerr*, 365 U.S. at 136).

We applied this principle in *Mass. School of Law at Andover, Inc. v. American Bar Assoc.*, 107 F.3d 1026 (1997) ("*MSL*"). There, the plaintiff, an unaccredited law school, complained of injuries resulting from the fact that, without ABA accreditation, the school's graduates were refused admittance to most states' bar examinations.

We identified the critical issue as "whether state or private conduct caused the injury MSL alleges it suffered." *Id.* at 1035. Looking to the source of the restraint-causing injury, we found that because "every state retains the final authority to set all the bar admission rules," any injury the plaintiff suffered "is the result of state action and thus immune." *Id.* at 1035-36.

This reasoning was similarly applied in *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1147 (1st Cir. 1993), where the defendant insurers allegedly employed a boycott in an effort to force legislature to enact legislation permitting rate increases. Because all the plaintiff's claimed injuries were associated with increased rates charged by the defendants after the legislature removed the rate limits, the court concluded that ["plaintiff's injuries] must be viewed as a product of state action" and that the defendants were, accordingly, immune from liability.

Here, looking to the source of the complained of injuries, we find that all of the Surgical Center's alleged injuries arise solely from the denial of the CON: the denial of the ability to operate the proposed facility; the loss of the CON's value, the value of the facility, and the value of the operation's proceeds; the delay in securing the CON;; and "other related losses." Each of the injuries the plaintiff claims is a direct result of the Department's decision to deny the plaintiff's application for a CON.[3]

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[3] While plaintiff also claims "increased costs, legal and otherwise, in pursuing Plaintiff's application for a CON." the referenced costs apparently relate to the appeal plaintiff prosecuted from the Board's decision. Plaintiff does not contend that it incurred costs at the Board level in excess of the cost it would have incurred had the threat of a boycott (or the alleged misrepresentations) not been made.

In sum, where, as here, all the plaintiff's alleged injuries result from state action, antitrust liability cannot be imposed on a private party who induced the state action by means of concerted anticompetitive activity. It follows that the complaint fails to state a boycott claim upon which relief can be granted. *See Noerr*, 365 U.S. at 136; *Parker*, 317 U.S. at 352.

IV.

The Surgical Center's second claim is that the Hospital defendants, as a part of their conspiracy, misled the Department, the Board, and the Commonwealth Court into believing that the Hospital's partially constructed facility would soon open and meet the needs of the relevant market when the Hospital defendants knew that the facility would not be completed. The resulting injury, it is said, was the denial of the Surgical Center's application for a CON. The Center would have us deny antitrust immunity to the Hospital defendants on the grounds that they successfully opposed the issuance of a CON using information known to be false.

Although the Supreme Court suggested in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972), that petitioning activity involving knowingly false information submitted to an adjudicative tribunal might not enjoy antitrust immunity, the Court has never so held. *See PRE*, 508 U.S. at 61 n.6 (suggesting that the issues of whether there is a misrepresentation exception to *Noerr* and, if so, the extent thereof, remain open). Moreover, since *California Motor*, the Supreme Court has decided a case that casts doubt on whether such an exception exists under any circumstances and dictates that, in the circumstances of this case, we honor the Hospital defendants' claim of immunity.

In *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991), Columbia Outdoor Advertising, Inc. ("COA") controlled 95 percent of the billboard rental business in Columbia, South Carolina. According to respondent Omni Outdoor Advertising, Inc. ("Omni"), a newcomer to the market, COA and city officials conspired to restrain competition in the market through adoption of a zoning ordinance limiting the size, spacing, and location of billboards in the city. Omni filed suit against the city and COA alleging a violation of the Sherman Act. A jury found the existence of a conspiracy between the city and COA, and both were held liable for Omni's injuries despite their insistence that they were entitled to antitrust immunity under *Parker* and *Noerr*, respectively.

The Court first concluded that Omni's alleged injury was the result of state action. South Carolina had authorized its municipalities to regulate land use and construction and, in doing so, had provided a "clear articulation of state policy to authorize anticompetitive conduct by the municipality in connection with its regulation." *Omni*, 499 U.S. at 372 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985)). As the Court explained:

> The very purpose of zoning is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) neccessarily protects existing billboards against some competition from newcomers.

Id. at 373 (footnote omitted).

Having thus concluded that "the city's restriction of billboard construction was prima facie entitled to *Parker*

immunity," *id.* at 374, the Court turned to the issue of whether the existence of a conspiracy between city officials and COA had stripped the city of that immunity. It first noted the foundation of *Parker* immunity:

> The rationale of *Parker* was that, in light of our natiional commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators.

Id. It then observed that if conspiracy was taken to mean "nothing more than an agreement to impose the regulation in question," the purpose of *Parker* immunity would be defeated because "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them." *Id.* at 375.

Because the jury had been instructed that a conspiracy was "an agreement . . . to accomplish an otherwise lawful result in an unlawful manner," *id.* at 376 n.5, the Court next considered whether *Parker* immunity is lost when it is shown that an agreement between the defendants involved governmental corruption, bribery, or other violations of state or federal law. It held that *Parker* immunity remains in such circumstances. The Court found "impractical" the contention that *Parker* immunity is forfeited by governmental corruption, "defined variously as 'abandonment of public responsibilities to private interests,' . . . 'corrupt or bad faith decisions,' . . . and "selfish or corrupt motives.' " *Id.* at 376. Such a rule would call upon antitrust courts to speculate as to whether state action purportedly taken in the public interest was the product of an honest judgment or desire for private gain. The Court stressed that *Parker* "was not meant to shift [judgments about the public interest] from elected officials to judges and juries." *Id.* at 377.

With respect to the contention that *Parker* immunity should be forfeited at least where bribery or other illegal activity may have subverted the state decision making process, the Court observed that this approach had "the virtue of practicality but the vice of being unrelated to" the purposes of the Sherman Act and *Parker*. *Id.* at 378. It chose to rely on sanctions other than the Sherman Act to discourage such behavior:

> To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construcing is not directed to that end. Congress has passed other laws aimed at combating corruption in state and local governments.

Id. at 378-79.

For these reasons, the Court rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on [charges that the state's decision making process was corrupted by bribery or other unlawful activity]." *Id.* at 379. It concluded its discussion of the city's immunity by "reiterat[ing] that, with the possible market participant exception,[4] *any* action that qualifies as state action is 'ipso facto . . . exempt from the operation of the antitrust laws.' " *Id.* at 379 (emphasis in original) (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984)).

Turning to the liability of Omni, the Court addressed whether *Noerr*'s immunity for private parties was subject to any of the exceptions that had been urged in the context

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[4] The referenced possible exception relates to state action as a purchaser or seller in the market rather than as a sovereign regulator.

of *Parker* immunity.[5] It declined to restrict *Noerr* immunity in this way for the same reason it had declined to so restrict *Parker* immunity:

> Insofar as the identification of an immunity-destroying "conspiracy" is concerned, *Parker* and *Noerr* generally present two faces of the same coin. . . . The same factors which, as we have described above, make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. "It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . . 'co-conspirators' " in some sense with the private party urging such action. *And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In Noerr itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned."* 365 U.S. at 145.

Id. at 383-84 (emphasis added).

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[5] The Court first concluded that the "sham" exception to *Noerr* immunity was inapplicable because that exception "encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* at 380. COA had sought to use only the outcome of the process to suppress competition.

The teachings of *Omni* are pertinent here. Considerations of federalism require an interpretation of the Sherman Act that forecloses liability predicated on anti-competitive injuries that are inflicted by states acting as regulators. Liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process. The remedy for such conduct rests with laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs. Federalism requires this result both with respect to state actors and with respect to private parties who have urged the state action.

Here, the Department is authorized by state statute to regulate the number, size, and spacing of health care facilities. Like the statute in *Omni*, this statute provides a "clear articulation of state policy" which authorizes the Department "to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Id.* at 373. While it is true that the challenged decision of the Department involved an individualized application of established criteria, rather than the establishment of criteria as in *Omni*, the Department's action was every bit as essential to the execution of the sovereign's regulatory policy as was the adoption of the zoning ordinance by the Columbia city council.

The Surgical Center's CON application called upon the Department to determine whether the opening of a new ASC was in the public interest. The Department conducted its own investigation and then held a hearing at which all interested parties had the opportunity to tender evidence and argument. It then made findings and deter-

mined that the issuance of the CON was not in the public interest. After a second hearing, that determination was concurred in by the Board, and the Commonwealth Court thereafter concluded that the Board's decision was supported by substantial evidence.

It is not clear to us that the issue of whether the Hospital's new facility would be completed was considered important by the Department or the Board. Neither made an express finding on that issue.[6] It is clear from the Board's written decision, however, that the Board heard evidence on the issue, knew constructon had been halted, and believed "there was credible evidence that the project ha[d] not been abandoned." Board Op. at 14. Thus, to the extent this issue was material, the record reflects that the decision makers recognized that there was a dispute and made a credibility determination concerning it.

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[6] The Board's "need projection formula" projected a need for 6.5 operating rooms. The Hospital currently had six general purpose operating rooms and a room used for "short procedures" such as endoscopies, colonoscopies and sigmoidoscopies. If and when the Hospital's proposed facility was completed, three of the general purpose operating rooms would be closed and the ambulatory surgical services provided in the main building would be provided in the new facility. The Surgical Center proposed to add two operating rooms under circumstances where the State Health Plan's need-project formula indicated, at most, need for one additional (seventh) operating room. In terms of the population to be served and the surgical services to be rendered, the Surgical Center's project would do little other than raise the number of operating rooms in Armstrong County above the limit set by the State Health Plan. The Board, therefore, concluded that approval of the instant CON application would result in needless duplication of *existing facilities* and health care services. While the Surgical Center projected a higher need and suggested that its facility would serve a larger area than the hospital, the Board found its projections flawed. The opinion of the Commonwealth Court establishes that it also understood this to be the basis for the Board's ruling, a basis for which it found support in the record.

On the facts alleged in the complaint, it is also clear that the state decision makers were disinterested, conducted their own investigation, and afforded all interested parties an opportunity to set the record staight. The initial decision was then twice reviewed. Finally, anyone who believed that a fraud was committed on the Department or Board could have moved to reopen the proceeding and attempted to persuade them that they were materially misled. *See, e.g.*, 1 Pa. Code §§ 35.231, 35.233 (authorizing a reopening of an administrative proceeding on motion of a participant or by the agency whenever the public interest requires). As matters currently stand, however, the Department's decision concerning where the public interest lies remains in place as the final decision of the Board and the judgment of the Commonwealth Court.

In these circumstances, *Omni* compels us to affirm the District Court.[7] Indeed, such a result seems to follow, *a fortiori*, from *Omni* given the conceded presence here of disinterested decision makers, an independent investigation, an open process, and extensive opportunities for error correction. The risk that the plaintiff's injury is not the result of a bona fide execution of state policy is far less substantial here than in *Omni* and there is, accordingly, far less justification for federal court review of the state's policy judgment. For these reasons, we must decline the Surgical Center's invitation to look behind the decisions

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[7] We acknowledge that the result we reach is in conflict with the holding of the court in *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986) and with the analysis of the courts in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998) and *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568 (6th Cir. 1986). To the extent of that conflict, we respectfully disagree with the views there expressed. We note that the courts in *St. Joseph's Hospital* and *Potters Medical Center* did not have the benefit of the Supreme Court's 1991 decision in *Omni* and that *Kottle's* brief analysis does not reference that decision.

of the Department, the Board, and the Commonwealth Court. Rather, based on *Omni*, we are constrained to honor the Hospital defendants' claim to *Noerr* immunity.[8]

V.

Accordingly, we will affirm the District Court's order dismissing the Surgical Center's complaint for failure to state a claim upon which relief may be granted.

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[8] This is not a case like *Walker Process Equip., Inc. v. Food Machinery and Chem. Corp.*, 382 U.S. 172 (1965), or *Woods Exploration & Prod. Co., Inc. v. Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971). In *Walker*, the state action was the issuance of a patent which allegedly had been procured by fraud. The attempted enforcement of the patent against the plaintiff was held actionable under the Sherman Act. The decision making process there was an *ex parte* one in which the Patent Office was wholly dependent on the applicant for the facts. While the Patent Office can determine the prior act from its own records, it effectively and necessarily delegates to the applicant the factual determinations underlying the issuance of a patent. Accordingly, when the applicant has submitted false factual information, the state action is dependent on financially interested decision making. *See* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Calif. L. Rev. 1177, 1249 (1992) (suggesting that the immunity exception recognized in *Walker* is "very narrow" and applies only when financially interested parties essentially made the factual determinations that triggered the governmental restraint). The same is true of the situation in *Woods* where the Texas Railroad Commission was wholly dependent on the antitrust defendants for the factual information on which it predicated its allocation of production from a given field.

SCHWARTZ, Senior District Judge, *Dissenting*:

With its decision today, the majority holds private parties who make misrepresentations that pervasively influence the decision making process of public entities are entitled to immunity under both the state action immunity doctrine and the *Noerr-Pennington* immunity doctrine. The majority opinion conflicts with the teaching of this Court in an opinion issued less than four months ago, which held that under certain circumstances applicable here, material misrepresentations that affect the core of a litigant's submissions to an administrative body are not entitled to *Noerr-Pennington* immunity. *See Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999).

I respectfully dissent for three reasons. First, I believe the misrepresentation exception to the *Noerr-Pennington* doctrine should be applied when intentional falsehoods pervade the entire state administrative proceeding leading to the denial of plaintiff's application for a certificate of need ("CON"). Second, the majority's position that the misrepresentation exception has no place in the jurisprudence of this Circuit is not supported by case law. Finally, the majority relies on a Supreme Court decision that is not applicable to this case. As a consequence, the defendant should not be able to escape liability for its misrepresentations under either the state action or Noerr-Pennington immunity doctrines.

According to the majority opinion, the defendants are immune from antitrust liability for their conduct during the course of petitioning the Pennsylvania State Health Facility Hearing Board ("Board") to deny plaintiff's application for a CON. The majority opinion finds *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), supports the dismissal of plaintiff's claim. First, the majority finds that the District Court properly

dismissed the boycott and misrepresentation claims under the *Noerr-Pennington* doctrine. The majority believes that *Omni* and *Cheminor Drugs* cast doubt on whether a misrepresentation exception to *Noerr-Pennington* immunity exists under any circumstances. Further, even if a misrepresentation exception exists, the majority asserts that the alleged misrepresentations were irrelevant because the Board denied the CON on grounds independent of the misrepresentations. The majority emphasizes that the decision makers were disinterested, conducted an independent investigation, and the process afforded opportunities for error correction. In summary, the majority has essentially found the denial of the CON was untainted by the alleged misrepresentations or boycott threats.

Second, the majority decision argues it was not the boycott or misrepresentation, but rather the denial of the CON that was the direct cause of the Surgical Center's alleged injuries. The majority concludes denial of the CON was state action and the Hospital parties are therefore immunized from antitrust liability under state action immunity, arguing that "[l]iability for injuries caused by such state action is precluded even where it is alleged that a private party during the action did so by . . . wrongful conduct that may have affected the decision making process." [Majority opinion at page 15]. Given the procedural posture of a motion to dismiss, I believe the majority's conclusion is not only impermissible fact-finding, but also contrary to the Surgical Center's entitlement to all favorable inferences and resolution of factual disputes in its favor.[1]

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[1] In ruling on a motion to dismiss, the court must accept the well-pleaded facts as true and resolve them in the light most favorable to the plaintiff. *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir. 1998); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). In

DISCUSSION

I. The Hospital Parties' Actions

Armstrong Surgical Center asserts the Hospital parties conspired to subvert the establishment of its facility by announcing to the Board, which was reviewing the Surgical Center's CON application, their intent to boycott the facility, and by submitting false and misleading information to the Board regarding the Hospital's ASC. The purpose of the boycott and misrepresentations was to eliminate a potential new entrant whose competition would adversely affect all the defendants. The Hospital has a complete area monopoly in providing operating room services. The nineteen physicians who sent boycott letters performed nearly 90% of all surgery in the relevant geographic area. Thus, the Hospital parties' actions targeted two criteria the Board considers in reviewing a CON application: (1) the need for the facility, and (2) its prospective economic viability.

The nineteen physicians in question sent letters to the Board, as it was considering the CON application, stating they would not use the plaintiff's ASC, but would only use the (fictional) ASC provided by the Hospital. The letters stated:

> I do not intend to perform surgery at the proposed Armstrong Surgical Center. I intend to use the services of the Ambulatory Surgery Center at Armstrong County Memorial Hospital. The hospital's

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addition, the court may consider allegations contained in the complaint, exhibits attached to the complaint, and matters of public record *See City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (1998); *Steinhardt Group, Inc. v. Citicorp*, 126 F.3d 144, 145 (3d Cir. 1997). Accordingly, this dissent, like the majority, considers both the Board's decision and the Commonwealth Court decision.

> Ambulatory Surgical Center provides the highest quality medical care at the most reasonable cost.

The letters go on to suggest that since the Hospital's ASC is superior, the proposed ASC is unnecessary: "It duplicates services already being provided, and it is not cost effective." All nineteen letters submitted to the Board were on the Hospital stationery, and contained the same language.

The Pennsylvania Department of Health ("Department") disapproved plaintiff's CON application on November 23, 1993. The Board affirmed the Department's decision on March 13, 1996. The Board relied on two grounds for affirming the denial of the CON: (1) the Board found the Hospital ASC made Armstrong's ASC duplicative and unnecessary, and (2) Armstrong's ASC would not be economically viable because 90% of the staff physicians would not use it.

The Hospital misrepresented to the Board that its ASC was substantially built and would be ready for use in the near future. When the Hospital parties made their misrepresentations, they knew the Hospital had ceased construction of its outpatient facility months before the hearing, and that construction had not resumed. The fact that the Department learned that this representation was false before it denied the CON does not detract from the falsity of the representation. The Department and the Board learned construction on the Hospital ASC had been interrupted, but they did not know the Hospital had no intent to build or operate a Hospital ASC. In fact, the Board opinion demonstrates the opposite was true. Although the Board knew the Hospital was using the building as a storage facility, it was led to believe that the Hospital had not abandoned the project. Further, because

it was not in its economic interest, the Hospital did not plan to resume construction if Armstrong's CON application was denied. The Board's decision relied on the misrepresentation that the Hospital ASC was or would be built and the threat of a boycott.

Armstrong's ASC would not be economically viable because the nineteen physicians who performed nearly all surgeries in the area would not use the new facility if completed because they would use the Hospital ASC. The Board noted the effect of the boycott letters sent by the physicians in explaining its denial of Armstrong's CON application:

> [T]he most damaging evidence is that the number of physicians who might have been expected to support the facility decreased significantly after the Applicant had submitted its projections. . . . The nineteen physicians who opposed the project in writing are responsible for approximately 90 percent of all surgery performed at the Hospital and each is on the Hospital's staff.
>
> In other words, after the application was submitted (and for whatever reason) support for the facility eroded among physicians who either had supported it initially or were being counted upon for their eventual participation. Because the Applicant would therefore have a generate much of its volume from outside the service area or from patients who reside in the service area but currently "migrate" to other locales for ambulatory surgery, we seriously doubt that the volume projections made for the facility can be achieved.

Board Op. at 47-48 (citations and footnote omitted).

With these facts in mind, I turn to the majority conclusion that the Hospital parties have immunity for the injuries resulting from their misrepresentations.

II. Applicability of the *Noerr-Pennington* Doctrine

The Hospital parties contend the *Noerr-Pennington* immunity doctrine applies because their announced intentions not to perform operations at Armstrong's ASC facility and statements regarding the existence of the Hospital ASC came in the context of supplying information to state agencies. In general, the *Noerr-Pennington* doctrine immunizes concerted efforts to restrain or monopolize trade when petitioning the government. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *see Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.* (*"PRE"*), 508 U.S. 49 (1993). The purpose or motive in petitioning government officials is irrelevant; the fact that the sole purpose might be to destroy a competitor does not undermine the protection afforded by the immunity. *Noerr*, 365 U.S. at 139. This is true even if "some direct injury" is an "incidental effect" of legitimate petitioning activity, regardless of whether the petitioner is aware of the infliction of such injury. *Id.* at 143-144.[2]

If the physicians had simply expressed their opposition to the proposed facility without intentionally misleading

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[2] The Court in *Noerr* stated:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

administrative decision makers about their intent to use the uncompleted Hospital ASC, the *Noerr-Pennington* doctrine would protect their statements. Similarly, if the Hospital had not informed the administrative decision makers it was going to build and operate a Hospital ASC, or if it had informed the decision makers it originally intended to build and operate a Hospital ASC but had concluded it would no longer do so. *Noerr-Pennington* immunity would be available to them. However, as set forth above and in the majority opinion, that is not what occurred.

A. Courts Have Distinguished Between Misrepresentations Made In The Political Context As Opposed to the Administrative or Adjudicative Context

The majority's reliance on *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), for the proposition that there is no misrepresentation exception to *Noerr-Pennington* immunity is misplaced. In *Omni*, one defendant sought to persuade the City of Columbia to create zoning ordinances, which had a detrimental effect on the plaintiff, who was a competitor of that defendant. The Supreme Court held that the defendant was not liable for antitrust violations for statements made to the city. 499 U.S. at 382. *Omni* reaffirmed that deliberate misrepresentations *in the legislative arena*, "reprehensible as [they are], can be of no consequence so far as the Sherman Act is concerned." *Id.* at 384. The majority's reliance on *Omni* is not persuasive because here, the setting is an adjudicatory arena, not a lobbying or legislative one as in *Omni*.

The majority cites *Omni* for the proposition that there is no misrepresentation exception. *PRE*, which was decided two years after *Omni*, suggests that the issue of

whether there is a misrepresentation exception to *Noerr-Pennington* remains an open question. 508 U.S. at 61 n.6. While *PRE* cited *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972), with approval, the Supreme Court in *PRE* declined to decide whether *Noerr* permits antitrust liability for a litigant's fraud or other misrepresentations. 508 U.S. at 61 n.6.

The Supreme Court has stated, not once, but twice, that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transp.*, 404 U.S. at 513. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988), stated that unethical and deceptive practices in "less political arenas," such as administrative or adjudicatory settings, could violate antitrust laws. Thus, the Supreme Court has broadly hinted *Noerr-Pennington* immunity is not intended to shield petitioning activities that do not further, but rather distort, the decision-making process in the non-legislative context.

Several Circuit Courts of Appeal also have distinguished between the level of immunity afforded to misrepresentations made in different forums. In *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568, 571 (6th Cir. 1986), the plaintiff alleged that the defendant hospital's certificate of need application contained materially false statements about the plaintiff. The court stated that "the knowing and willful submission of false facts to a government agency falls within the sham exception to the *Noerr-Pennington* doctrine." *Id.* at 580. The Fifth Circuit in *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), held that *Noerr* did not protect, *inter alia*, the filing of false production forecasts with a state regulatory commission. The court stated that

the *Noerr-Pennington* doctrine seeks to protect attempts to influence policies and held that "the abuse of the administrative process here alleged does not justify antitrust immunity." *Id.* at 1298.

Other cases have held the *Noerr-Pennington* doctrine does not immunize misrepresentations made in the administrative or adjudicative context. *See, e.g., Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 124 (3d Cir. 1999) (holding that material misrepresentations in an adjudicative arena are not protected by *Noerr-Pennington* immunity); *Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (finding that if sham claim involves administrative agencies, then *Noerr* does not protect "petitions based on known falsehoods"); *St. Joseph's Hosp., Inc. v. Hospital Corp. of Am.*, 795 F.2d 948, 955, *reh'g denied en banc*, 801 F.2d 404 (11th Cir. 1986), see *infra*; *Ottensmeyer v. Chesapeake & Potomac Tel. Co.*, 756 F.2d 986, 994 (4th Cir. 1985) (suggesting that knowing submission of false information to police—communications which "do not constitute the type of 'political activity' protected by the *Noerr-Pennington* doctrine"—would fall within the sham exception); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) (stating that *Noerr* does not immunize false information given to an administrative or adjudicatory body), *cert. denied*, 459 U.S. 1227 (1983); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972) ("No actions [efforts to deceive the Food and Drug Administration] which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption.").

The rationale for limiting immunity for private actors' efforts to mislead adjudicatory or administrative officials is that these entities, as compared to legislative bodies, rely

on information supplied by the parties to a greater extent than legislative bodies. *Allied Tube*, 486 U.S. at 499-500. The Ninth Circuit in *Clipper Exxpress*, 690 F.2d at 1261, explained:

> There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.

The majority recognizes the decision by the Department to deny the CON involved an individualized application of established criteria. However, it attempts to reconcile the difference between the adjudicative context and legislative context by arguing that the Department's decision to deny the certificate of need was "essential to to the execution of the sovereign's regulatory policy" regarding health care facilities. [Majority opinion at page 16]. This distinction is unpersuasive. Although the government agency's decision on the certificate of need application could be viewed as essential to regulating health care facilities, *St. Joseph's Hospital*, 795 F.2d at 955, and *Kottle v. Northwest Kidney Centers*, 146 F.3d. 1056, 1063 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1031 (1999), both held that misrepresentations in this context do not have *Noerr* immunity. Every adjudicative decision could be viewed as essential to a sovereign's regulatory policy and thus, the majority would nullify the distinction the Supreme Court and other appellate courts have made between misrepresentations made in the legislative context as opposed to the administrative or adjudicative context.

The majority appears to argue that the process employed by the Department could uncover misrepresentations because the Department conducted its own investigation. However, in *Cheminor*, the governmental bodies—the Department of Commerce ("DOC") and the International Trade Commission ("ITC")—also conducted their own investigation, but another panel of this Court still held material misrepresentations that affect the core of the defendant's petition will preclude *Noerr-Pennington* immunity. 168 F.3d at 121, 124 (stating that the "DOC and ITC make final determinations after they have conducted their own investigations . . . and after they have heard further arguments from the parties involved"); *see Clipper Exxpress*, 690 F.2d at 1261-62 (stating that submitting false information in an adjudicatory proceeding can be the basis for antitrust liability even if the agency was not misled by the information). The majority's view, carried to its logical extreme, would allow the more skillful liar to avoid antitrust liability so long as the decision maker conducts its own investigaiton.

Moreover, it is not clear the Department conducted an independent investigation. Rather, the Department relied on the Hospital defendants to give truthful information so that it could make a fully informed decision. The majority's opinion recognizes the Board was misled because the Board "made a credibility determination" "that the project ha[d] not been abandoned." [Majority opinion at page 17]. However, the majority refuses to acknowledge that the Board opinion demonstrates that the denial of the CON was based on the false belief, nurtured by the Hospital defendants, that the Hospital would build its ASC.

B. Similar Cases Have Held That Misrepresentations Relating to a CON Application Do Not Enjoy *Noerr* Immunity

The facts in *St. Joseph's Hospital* closely parallel those alleged by the plaintiff. The defendant, Memorial Medical Center ("MMC"), was the sole provider of cardiac surgery services in the relevant market area. 795 F.2d at 952. It opposed St. Joseph's CON application, claiming it already had the capacity to perform more heart procedures in the region than required, thus making its competitor's services unnecessary. *Id.* The Board relied upon this information in denying St. Joseph's request for a CON. *Id.* St. Joseph's sued, asserting MMC provided false information to the Board. *Id.* at 953. The court found that the misrepresentations were not made in the political arena and held that parties furnishing false information to a government agency passing on specific certificate applications are not entitled to *Noerr-Pennington* petitioning immunity. The court held:

> When a governmental agency such as [the State Health Planning Agency] is passing on specific certificate applications it is acting judicially. Misrepresentations under these circumstances do no not enjoy *Noerr* immunity.

Id. at 955. Accordingly, the court reversed the district court's decision granting the defendant's motion to dismiss. *Id.* at 957.

The Ninth Circuit, like the Eleventh Circuit in *St. Joseph's Hospital*, also held *Noerr-Pennington* immunity does not protect a party's intentional misrepresentations in similar circumstances. *Kottle v. Northwest Kidney Centers*, 146 F.3d. 1056 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1031 (1999). As in this case, the district court in *Kottle* granted the defendant's motion to dismiss.

Id. at 1058-59. The *Kottle* court also examined allegedly false information relating to a CON application. *Id.* at 1058. The court stated that if misrepresentations made by a defendant were of such magnitude that the "entire CON proceeding was deprived of its legitimacy," then the sham exception to *Noerr-Pennington* immunity would apply. *Id.* at 1063.

The misrepresentations in *Kottle* were made in an administrative or adjudicatory arena because the Department of Health, the decision maker, conducted public hearings, accepted written and oral arguments, permitted representation by counsel, issued written findings, and its decision was appealable. *Id.* at 1062. In this case, the Department also conducted public hearings, accepted evidence and argument from interested parties, made findings, and its decision was appealable. Since the court in *Kottle* found that the misrepresentations were not made in the political or lobbying context, the court applied a different standard than the one set forth in *Omni*. *Id.* (stating that "intentional misrepresentation to government officials" is treated differently "outside of the political realm"). The court found, however, that the plaintiff's complaint fell short of invoking the sham exception because the plaintiff's vague allegations of misrepresentation were insufficient to overcome the defendant's *Noerr-Pennington* immunity. *Id.* at 1064. The court could not ascertain "what representations [the defendant] made, or to whom; with whom [the defendant] conspired . . . or what other testimony the Department may have had that could have influenced its decision to deny [plaintiff]'s CON application." *Id.* In contrast, the plaintiff's complaint in this case details the alleged misrepresentations made by the defendants, and the Board decision demonstrates that such material misrepresentations influenced its decision, as well as that of the Commonwealth Court. *See infra.*

C. The Defendants' Actions Nullify Their *Noerr-Pennington* Immunity

Our recent decision in *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999), does not support the majority's position. In *Cheminor*, the defendant Ethyl Corporation complained to the ITC and the DOC that plaintiff Cheminor was dumping and selling ibuprofen at less than fair value. *Id.* at 120. Cheminor brought antitrust claims in which it alleged that Ethyl's statements to the ITC were baseless, made in bad faith, contained false statements, and were brought only for anti-competitive reasons. *Id.* The issue decided by this Court was whether alleged misrepresentations by Ethyl vitiated its *Noerr-Pennington* immunity. The Court in *Cheminor* found the alleged misrepresentations were neither material, nor affected the core of the defendant's petition because the misrepresentations relating to the defendant's profitability were "only a small proportion of the numerous factors the ITC must consider when making a determination of material injury." *Id.* at 126. Therefore, we affirmed the decision to grant summary judgment in favor of Ethyl because Cheminor did not satisfy the first step of *PRE*'s sham exception to the *Noerr-Pennington* doctrine. *Id.* at 127.

Cheminor held material misrepresentations that "infect the core" of the defendant's claim and the government's resulting actions are not entitled to *Noerr-Pennington* immunity under the "objectively baseless" prong of *PRE*. *Id.* at 123. *Cheminor* requires evaluation of misrepresentations in determining whether a defendant is entitled to *Noerr-Pennington* immunity. The majority relies on the following language in *Cheminor* to assert *Cheminor* stands for the proposition that this Circuit has held the misrepresentation exception is not part of its jurisprudence.

> We decline to carve out a new exception to the broad immunity that *Noerr-Pennington* provides. Rather, we will determine whether [defendant]'s petition was objectively baseless under the Supreme Court's test in *PRE*, without regard to those facts that [plaintiff] alleges [defendant] misrepresented.

Id. There are three answers to the majority position. First, it ignores the immediately succeeding sentence in the opinion:

> If the alleged misrepresented facts do not infect the core of Ethyl's claim and the government's resulting actions, then the petition had an objective basis and will receive *Noerr-Pennington* immunity under the first step of *PRE*.

Id. I read this language as meaning that prior to determining whether the "petition had an objective basis" the Court must determine "[i]f the alleged misrepresented facts do . . . infect the core of Ethyl's claim." *Id.* If they do, the misrepresentation exception applies and there can be no "objective basis" for the defendant's position. If, on the other hand, the misrepresentation exception is not applicable, the defendant's petition could well have an objective basis.

Second, the majority has not explained why, if the *Cheminor* court held there was no misrepresentation exception to the *Noerr-Pennington* doctrine, it formulated a test for the misrepresentation exception and then painstakingly applied the test analyzing whether the misrepresented facts affected "the core of Ethyl's claim and the government's resulting action. . . ." *Id.* Third, the court in *Cheminor* relied on a district court case. *Music Center S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 549 (E.D.N.Y. 1995).

The specific language cited with approval by *Cheminor* reads:

> [A] determination [of objective basis] requires consideration, *inter alia*, of . . . the nature of the particular allegations of the petition or actions before the administrative agency claimed to be fraudulent or improper, and *whether these claimed misrepresentations or improper actions would have been significant to the ultimate outcome or continuation of the proceeding.*

Cheminor, 169 F.3d at 124 (citing *Music Center*, 874 F. Supp. at 549) (emphasis added). If there were any doubts regarding the court's reliance on *Music Center* and its approval of the misrepresentation exception to *Noerr-Pennington* immunity, the *Cheminor* court set them to rest:

> If the government's action was not dependent upon the misrepresented information, the misrepresented information was not material and did not go to the core of Ethyl's petition. *In usm, a material misrepresentation that affects the very core of a litigant's . . . case will preclude Noerr-Pennington immunity, but not every misrepresentation is material to the question of whether a petition such as Ethyl's had an objective basis.*

Id. at 124 (second emphasis added and footnote omitted). I am simply unable to accept the majority's reading of *Cheminor*.

Further, the test set forth in *Cheminor* is applicable here because the alleged misrepresentations in *Cheminor* were made in the adjudicative context. *Omni* is not applicable because the alleged misrepresentations in that case were made in a legislative context. In a factually similar

case, the 11th Circuit found that "[w]hen a government agency . . . is passing on specific certificate [of need] applications it is acting judicially." *St. Joseph's Hospital*, 795 F.2d at 955. Misrepresentations made under these circumstances do not enjoy *Noerr* immunity. *Id.*

There is a final troubling aspect of the majority's opinion. Assuming this dissent's position is correct that Cheminor recognizes a misrepresentation exception as part of this Circuit's jurisprudence and that the majority holds there is no misrepresentation exception to the Noerr-Pennington immunity doctrine, the majority has done something it cannot do. Under Rule 9.1 of the Internal Operating Procedures of this Court, "no subsequent panel overrules the holding in a published opinion of a previous panel."

1. The Defendants' Alleged Misrepresentations Were Material And Infected The Core Of The Defendants' Statements To The Department

The legitimacy of the Board's decision is in question because it relied upon materially false information and was influenced by threats of an illegal boycott. As stated previously, at this stage of the litigation, the plaintiff is entitled to all favorable inferences and resolution of factual disputes in its favor. Therefore, the court must exammine whether Armstrong Surgical is entitled, at a minimum, to an inference that the misrepresentations were not only material, but also affected the core of the defendant's claims.

The majority concluded the Board would have denied the CON application regardless of whether the Hospital ASC would be completed. However, the Board's opinion clearly shows that it premised the denial of the CON upon the Hospital's misrepresentation that it would complete

and operate a Hospital ASC. In successive Findings of Fact the Board found:

> 25. The Hospital has partially completed construction of a building on its premises that would house a dedicated outpatient surgical facility.
>
> 26. Upon completion of the Hospital's outpatient surgical facility, three of its existing operating rooms would be moved into the new building.
>
> 27. The proposed ambulatory surgery center and the one which has been partially constructed by the Hospital would serve the same population and would provide essentially the same surgical services.
>
> 28. The Applicant's proposed ambulatory surgery center would needlessly duplicate existing facilities and health care services in Armstrong County.

Board Op. at 6 (citations omitted). Taken in context the phrase "needlessly duplicate existing facilities," *supra*, can only mean that Armstrong's proposed ASC would duplicate the proposed Hospital ASC. In addition, the letters from the 19 physicians stated that the proposed facility duplicated the services already being provided. As previously rehearsed, the Hospital parties knew there was no commitment or intent to complete a functioning Hospital ASC.

Not only the Findings of Fact, but also the Board opinion make clear that the Board, relying upon the misrepresentations of the Hospital parties, premised its denial of the CON and its entire discussion of need-projection upon there being no need for two ASCs—the Hospital's ASC and Armstrong's ASC:

> Although outpatient surgery at the Hospital is now performed in the same opearting room as inpatient

surgery, the Hospital has partially [9] completed construction of a building on its premises to house a dedicated outpatient surgery facility. Upon completing construction, the Hospital would move three existing operating rooms into the new building.

With regard to the population to be served and the surgical services to be offered, there would be little difference between the Applicant's ambulatory surgical center and the one that the Hospital has partially completed, except that the Applicant's project would raise the number of operating rooms in Armstrong County above the limit set by the SHP. We conclude that approval of the instant CON application would result in needless duplication of existing facilities and health care services.

We believe that the factors set forth above, in themselves, are sufficient to support a finding that the Applicant has failed to establish need for the proposed facility by the population to be served. . . .

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[9] Apparently, after construction of the building and some of the interior walls had been completed, staff physicians at the Hospital began to question whether a separate outpatient facility was necessary. Although the building is currently being used as a storage facility, there was credible evidence that the project has not been abandoned.

Board Op. at 14 (citations omitted). It is noteworthy that the three Commonwealth Court judges, conducting judicial review, were of the belief that the Hospital ASC would be completed:

> The hospital has partially completed construction of a building on its premises that would house a dedicated outpatient surgical facility. Upon completion of the hospital's outpatient surgical facility, three of its existing operating rooms would be moved into the new building.

> The proposed ambulatory surgery center and the one which has been partially constructed by the hospital would serve the same population and would provide essentially the same surgical services. Armstrong's proposed ambulatory surgery center would needlessly duplicate existing facilities and health care services in Armstrong county.

Commonwealth Court Op. p. 5. At the very least four judges—three Commonwealth judges and this judge—read the Board opinion as indicating that the Department believed the Hospital ASC would be completed.

The presence or absence of a Hospital ASC was significant. A CON is granted if a proposed health care expenditure will meet medical needs of the target population in an effective and *cost efficient* manner. *See* Pa. Stat. Ann. tit. 35 § 448.707. There is no question that an ASC was more cost efficient than the continued use of the six hospital operating rooms. The Hospital's own accountant documented projected average cost savings of $400 per case if an ASC were used relative to the current Hospital operating rooms.

The issue before the Board was whether there would be overcapacity of ASCs if a CON were issued to Armstrong. Because the misrepresentations led the Board to believe there would be a Hospital ASC, it never reached the issue of delivering effective and cost efficient medical services under the scenario in which there was no Hospital ASC. There is simply no way for the District Court or this Court to determine whether the Board would have granted the CON had it known the true facts. With the Court having to accept all well-pleaded facts as true and resolve them in the light most favorable to the nonmovant, see *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir. 1998),

the plaintiff is surely entitled to the reasonable inference that the Board predicated its decision, in major part, on the belief that a Hospital ASC would be completed. Therefore, I would hold the alleged misrepresentations deprive the Hospital parties of *Noerr-Pennington* immunity because their misrepresentations were material and infected the very essence or core of the administrative proceeding and consequent denial of the CON by the Board and affirmance of the Board's decision by the Commonwealth Court. Where as here, the misrepresentations caused the Board and Commonwealth Court to make their determinations based upon the existence of a fictional Hospital ASC, the administrative proceeding and Commonwealth Court review have been deprived of their legitimacy.

2. *Noerr-Pennington* Immunity Does Not Protect Threats of an Illegal Boycott

While an issue of first impression, the question of whether *Noerr-Pennington* petitioning immunity protects threats of an illegal boycott must also be answered in the negative. The Supreme Court has stated, "[t]here are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations." *California Motor Transp.*, 404 U.S. at 513. If the Supreme Court would not immunize misrepresentations in the judicial or administrative context, it surely would not immunize threats of illegal activity when they corrupt the administrative adjudication process. Where a threat of illegal activity plays such a strong role in the administrative decision-making process and forms part of the basis for an administrative decision, it is impossible to say that the process has not been corrupted. Denying *Noerr-Pennington* immunity to those who provide false informa-

tion to the government in its deliberate decision-making process can only *improve* the information flowing to the government.

Attention is now turned to whether the Hospital parties are protected by state action immunity as urged by the majority.

III. Applicability of State Action Immunity

The majority opinion also dismisses Armstrong's complaint on the theory that the Hospital defendants' actions are immunized under the *Parker* state action immunity doctrine. *See Parker v. Brown*, 317 U.S. 341 (1943). The state action immunity doctrine has two related aspects. First, as elaborated in *Parker*, state action immunity protects parties who engage in otherwise actionable antitrust conduct, pursuant to, and in reliance upon, state action. Second, state action immunity applies when the antitrust injury complained of arises directly from state action, as distinguished from the private action alleged in the complaint before us. *Noerr*, 356 U.S. at 136. In this case, neither aspect of state action immunity is applicable.[3]

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[3] The staff physicans defendants eschewed reliance upon *Parker* state action immunity, stating in the catch line of their argument, "Plaintiff's Attempt to Reframe this Appeal in Terms of State Action Immunity is Misguided. . . ." Individual Appellee's Br. at 20. Further, the Hospital dropped all reference to state action immunity on appeal. Appellee's counsel made a deliberate, reasoned choice not to rely on the theory, going so far as to state that "the correctness of the District Court's decision . . . is not accurately analyzed under state action immunity." Individual Appellee's Br. at 22. Thus, this is not a circumstance where a litigant's counsel overlooked a theory. While this Court is not limited by positions advanced by the litigants, caution is warranted where capable counsel expressly disavow reliance on a defense. The majority nonetheless has relied upon a state action defense explicitly and impliedly discarded by the defendants.

It is clear the actions complained of were not pursuant to, or in reliance upon, state action. Indeed, reliance upon the state action of denial of the CON to immunize unlawful anti-competitive conduct which occurred *prior* to and caused the denial of the CON presents severe conceptual difficulties. The only state action was denial of the CON. The Hospital parties engaged in no alleged unlawful anti-competitive behavior *following* the denial of the CON. Rather, the misrepresentations combined with the expressed intent to engage in a boycott all occurred *before* the Board's denial of the CON. With this state of affairs, it is difficult to understand how the misrepresentations coupled with the stated intent to boycott are somehow immunized by the CON, where the alleged wrongful activity itself was directed to and resulted in the denial of the CON. Furthermore, even assuming these conceptual difficulties are not insurmountable, there is no indication the Hospital parties relied upon the denial of the CON in carrying out the alleged unlawful anticompetitive behaviors, or were authorized by the state to do so. Indeed, the *Parker* court expressly noted that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. Therefore, the "authorization" aspect of state action immunity is not applicable to the facts of this case.

The second aspect of state action immunity doctrine "immunizes" antitrust injuries directly caused by state action. It is this second aspect upon which the majority opinion rests, arguing that liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did do by unlawful conduct.

The defendants' actions are not protected by state action immunity for two reasons. First, at least some of the

injuries of which Armstrong complains were not the direct result of the only state action alleged—the denial of the CON. Second, a misrepresentation exception to state action immunity must apply under the circumstances presented by this case.

The majority finds the plaintiff failed to allege that its injuries were caused by the hospital parties' alleged economic boycott and misrepresentations. Rather, the majority asserts the alleged injuries were either directly related to the denial of the CON, or the consequences thereof. Even accepting *arguendo* that state action immunity applies to this case, some of the injuries alleged by Armstrong are not the direct result of state action, but of the alleged misrepresentations and conspiracy to boycott. After reciting throughout its complaint the boycott and misrepresentations, the Surgical Center lists the following damages:

> (1) Denial of the CON required to establish and operate [its ambulatory surgery center].
>
> (2) Denial of [its] ability to establish and operate [the proposed facility].
>
> (3) Delay in securing the required CON, if ultimately granted, for the establishment and operation of the [ambulatory surgery center].
>
> (4) Increased costs, legal and otherwise, in pursuing Plaintiff's application for a CON.
>
> (5) Complete loss of the value of the CON, or a reduction in its value when and if ultimately granted.
>
> (6) Complete loss of the value of Plaintiff's [facility], or reduction of its value when and if permitted to be operated.

(7) Complete loss of, or reduction in, the income and cash flow which Plaintiff would have received from operation of the [center].

(8) Other related losses.

Because of the threatened boycott, damage claims 5, 6 and 7 would have occurred even if Armstrong had received the coveted CON. The boycott of plaintiff's surgical center by physicians who perform 90% of surgical procedures in the relevant geographic market surely would serve to reduce the value of the plaintiff's facility, either by the loss of business or the increase in costs associated with attracting personnel to the facility. An agreement to exclude the plaintiff from the relevant market by an economic boycott and misrepresentations to the Board may result in antitrust injury. *See, e.g., Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 877 (3d Cir. 1995) (finding complaint adequately alleged antitrust injury where plaintiff alleged that defendants unreasonably restricted his ability to practice medicine in the relevant market and thus reduced competition). Therefore, I cannot agree with the majority's conclusion that damage claims 5, 6 and 7 stemmed from denial of the CON.

The misrepresentation exception to *Noerr-Pennington* immunity should also apply to state action immunity in the adjudicatory or administrative context. Where misrepresentations and/or threats of illegal activity subvert the entire decision making process, the direct cause of the injury is not the state action, but rather the misrepresentations or threats which made a decision based on accurate information impossible. *See Woods Exploration & Producing Co., Inc. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1295 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *see also Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 176 (1965) (hold-

ing that procurement of patent by fraud on the United States Patent Office is actionable under the Sherman Act, notwithstanding intervening state action of granting the patent).

In the legislative arena, it is difficult to say that any particular action, no matter how inappropriate, results in a particular legislation which causes injury. However, in the administrative and judicial arenas, where agencies and courts write *reasoned* opinions and make decisions based on information supplied by the parties, they must depend on the parties to provide accurate information.[4] As stated above, the Supreme Court has noted different standards apply to conduct in administrative or adjudicatory processes. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *see supra*, Part II.A. The misrepresentations here, at the very least, largely influenced and very probably dictated the outcome of the administrative process. Under that circumstance, it is the misrepresentations, not the state action, which caused the alleged injuries and dictated the Board's decision to deny the CON.[5]

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[4] It is for this reason that reliance by the majority on *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1142 (1st Cir.), *cert. denied*, 510 U.S. 818 (1993), is misplaced. That case involved a decision by a *legislature* to change the law in the face of a boycott. It is impossible to say that the boycott dictated the outcome of the legislature's decision.

[5] The majority's reliance on *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026 (3d Cir.), *cert. denied*, 118 S.Ct. 264 (1997), also is misplaced. There, an unaccredited law school alleged the American Bar Association engaged in anticompetitive conduct because graduates from unaccredited schools could not sit for most state bar examinations. This Court concluded the source of the injury was the action of each of those states because "every state retains the final authority to set all the bar admission rules." *Id.* at 1035. That case is distinguish-

Because *Parker* and *Noerr* are complementary expressions of one principle of antitrust law, a misrepresentation exception to *Parker* immunity is necessary to effectuate the misrepresentation exception to *Noerr-Pennington* immunity. Without an exception for those misrepresentations which have a pervasive influence on administrative and adjudicative decisions, only those defendants who most effectively subvert the state's process—the ones whose improper behavior results in favorable results for them from the state's administrative and adjudicatory processes—would be immune under state action immunity. This would not only be a perverse result, but would entirely vitiate the misrepresentation exception to *Noerr-Pennington* immunity.

This case is similar to *Woods*. In *Woods*, the defendants, partial owners of a natural gas field, intentionally gave false information about their production forecasts to the Texas Railroad Commission. 438 F.2d. at 1295. The Commission used that information to determine allowable production. *Id.* The court rejected "the facile conclusion that action by any public official automatically confers exemption." *Id.* at 1294 (citations omitted). The court held that state action immunity was not applicable because the misrepresentations dictated the outcome: "defendants' conduct here can in no way be said to have become merged with the action of the state since the Commission neither was the real decision maker nor would have intended its order to be based on false facts." *Id.* at 1295. Thus, the injury was not directly caused by state action, but by the misrepresentations. Similarly in the instant case, the Board relied on the Hospital parties' statements of subjective intent in making its decision.

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able from the instant case for two reasons. First, the state action in that case was non-adjudicative in nature. Second, and more importantly, the plaintiff made no allegation that the ABA knowingly made misrepresentations which were central to each state's actions.

The majority believes that *Woods* is distinguishable from the present case because the Texas Railroad Commission "was wholly dependent on the antitrust defendants for the factual information on which it predicated its allocation of production from a given field." [Majority opinion at 18 n.8]. The court in *Woods* stated that the Railroad Commission had "no opportunity for meaningful supervision or verification" of the defendants' statements and therefore, the Commission "must rely on the truthfulness of the gas producers." *Id.* at 1295. I do not find *Woods* to be so different from this case. Here, the Department and Board had no way of ascertaining whether the Hospital truly intended to complete its ASC. The Department and the Board were reasonable in relying on the defendants' statements, which clearly implied that the Hospital ASC would be completed and utilized. Further, the court in *Woods* did not require that the government entity be "wholly" dependent on the information provided by a defendant in order to deny state action immunity.

CONCLUSION

For the reasons stated above I would hold state action immunity does not protect the defendants' actions. I also conclude there is a misrepresentation exception to *Noerr-Pennington* immunity and that it applies in this case. My view that material misrepresentations can vitiate *Noerr-Pennington* immunity is supported by *Cheminor*, 168 F.3d at 124, and the case law of other circuits, specifically the Fifth, *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 438 F.2d 1286, 1298 (5th Cir. 1971), Sixth, *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568, 580 (6th Cir. 1986), Ninth, *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1031 (1999),

Eleventh, *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948, 955 (11th Cir. 1986), and District of Columbia, *Whelan v. Abell*, 48 F.3d 1247, 1254-55 (D.C. Cir. 1995). *See also Cheminor*, 168 F.3d at 131 (Sloviter, J., dissenting) (citing *Whelan* and *Kottle* for the proposition that *PRE* preserves a fraud exception to antitrust immunity).

The misrepresentations were material as there is an overpowering inference that in denying the CON the Board accepted the Hospital parties' misrepresentation that the Hospital would complete construction and operate a Hospital ASC. These same misrepresentations caused the Board and Commonwealth Court to pass upon the question of whether there was a need for two ASCs. Specifically, the misrepresentations deprived the Board from passing upon the CON application based upon the true facts—six hospital rooms vis-a-vis the grant of Armstrong's application for a CON, with concomitant cost savings of $400 per case, thereby meeting the statutory goal of meeting medical needs in an effective and cost efficient manner. We do not know, of course, whether the Board would have granted or denied the CON application had its proceeding not been so pervasively infected by the misrepresentations and threat of boycott.

I respectfully and regrettably dissent for all of the reasons set forth above. While respecting my colleagues differing views, I cannot agree with them. I regret the majority result for two reasons. First, the majority opinion, in light of *Cheminor*, has provided little, if any, guidance to the bar, future litigants or the public. Second, to the extent the majority result provides guidance, it signals that it is willing to immunize clear antitrust violations if they can be disguised, however disingenuously, as petitioning activities without regard to whether they are legiti-

mate, and without distinguishing the arena in which they are made.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
FOR THE

Civil Action No. 96-1384

ARMSTRONG SURGICAL CENTER, INC.,
Plaintiff,

v.

ARMSTRONG COUNTY MEMORIAL HOSPITAL; ROGELIO BORJA; RICHARD BOSCO; ZAFAR CHODHRY; JEFFREY DAVID; FRANK DVIE; EGBERT deVRIES; PAUL L. FREDERICK; JOHN GARROTT; FRANK N. GENOVESE; IRVING KLEIN; DAVID H. KOHL; LEE H. KOSER; JOHN MARTY; MICHAEL P. ONDICH; KARL R. SALTRICK; WILLIS SHOOK; ANTHONY SMALDINO; PETER SOTOS; JAE T. YANG,

Defendants.

OPINION

DIAMOND, D.J.

Plaintiff commenced this action under the Sherman Act, 15 U.S.C. §§ 1 and 2, seeking redress for defendants' conduct in conjunction with plaintiff's application before the Pennsylvania Department of Health seeking a certificate to build a medical facility in Armstrong County, Pennsylvania. Presently before the court are defendants' motions to dismiss. For the reasons set forth below, the motions will be granted.

I.

Plaintiff's complaint alleges the following. Plaintiff is a Pennsylvania corporation which sought to construct an ambulatory surgical center ("ASC") in Armstrong County. The proposed ASC would have provided outpatient surgical services and would have consisted of two operating rooms, a special procedures room and a dental room. Its services would have encompassed general surgery and various specialties including ENT, gastroenterology, gynecology, ophthalmology, orthopedics and urology. Defendants are the Armstrong County Memorial Hospital ("Hospital") and nineteen physicians on the Hospital's medical staff.

On March 11, 1991, plaintiff filed an application with the Pennsylvania Department of Health ("Department") seeking a certificate of need ("CON") as required by the Pennsylvania Health Care Facilities Act, 35 P.S. § 448.101 *et seq.*, in order to establish its outpatient ASC. The Department engaged in an extensive review process which included investigation, evaluation of submitted materials, and a public hearing on October 7, 1993. Complaint at ¶ 10.

At the time of plaintiff's application the Hospital was the only facility which had operating rooms in Armstrong County. Throughout the Department's investigation and review of plaintiff's application the Hospital vigorously opposed plaintiff's application for a CON. *Id.* at ¶ 12.

Approximately two months after plaintiff filed its application, the Hospital, which up until that point had only five mixed-use operating rooms ("ORs"), requested permission from the Department to add an additional OR. The Hospital's request was granted. At the time of the Department's hearing on plaintiff's application, the Hospital had six mixed-use ORs. *Id.* at ¶ 13.

On November 29, 1993, the Department denied plaintiff's application for a CON. Plaintiff appealed the denial to the Commonwealth of Pennsylvania State Health Facility Board ("Board"). On March 13, 1996, after conducting hearings in which additional evidence was submitted, the Board affirmed the Department's decision. *Id.* at ¶ 16. "In its Opinion, Findings of Fact, and Conclusions of Law, the Board held that, although the Plaintiff had met the requirements of the State Act and had met the criteria of Chapter 29 of the State Health Plan, the merits required denial of the CON application on two interrelated grounds:

> (1) A partially completed Hospital ASC made the Plaintiff ASC unnecessarily duplicative and, therefore, unneeded; and
>
> (2) The Plaintiff ASC would not be economically viable because the Physicians Group which performed 90% of all surgery performed in Armstrong County would only use the Hospital ASC and would not use the Plaintiff ASC."

Id. at ¶ 17. Plaintiff commenced this action on July 26, 1996, alleging antitrust violations.[1]

After plaintiff submitted its application, the Hospital after receiving Department authorization, began construction on a building attached to the Hospital. The Hospial represented to the Department that the building would provide alternative space for three of its current six mixed-use ORs and would be used exclusively for ambulatory surgery. The proposed ASC would not have increased the total number of operating rooms in Armstrong County. *Id.* at ¶ 19. Prior to June 17, 1993, after the shell of the

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[1] Plaintiff also appealed the Board's decision to the Commonwealth Court of Pennsylvania. On January 27, 1997, the Commonwealth Court affirmed the decision of the Board.

building had been erected, construction of the Hospital ASC stopped and has never been resumed. Extensive additional construction and installation work would be required in order to bring the Hospital ASC into service. *Id.* at ¶ 20.

At the hearing before the board, each of the individual physicians submitted identical letters prepared on Hospital stationery which indicated that the individual physician did "not intend to perform surgery at the proposed Armstrong Surgical Center" and intended "to use the services of the Ambulatory Surgical Center at Armstrong County Memorial Hospital'' because "[t]he Hospital's [ASC] provides the highest quality medical care at the most reasonable costs." Each physician recommended that the plaintiff's application be denied because plaintiff's ASC was unnecessary, would duplicate services already being provided and would not be cost effective. *Id.* at ¶ 21. These letters "were written in furtherance of the agreement combination and conspiracy of all Defendants for the purpose of (i) preventing competition in providing outpatient surgical services in Armstrong County and (ii) preventing or limiting competition in providing medical services for outpatient surgery in Armstrong County. Complaint at ¶ 25. "At all relevant times the interest of the Hospital was solely to preserve the status quo by preventing competition with the Hospital in supplying outpatient surgical services in Armstrong County, not to complete the Hospital ASC." *Id.* at ¶ 26.

"In 1992 the Hospital secured a change in its status for Medicare rembursement ("Price") for the sole purpose of increasing Medicare reimbursement ("Price") by approximately $1,500,000.00 in the year ending Sepember 30, 1993" *Id.* at ¶ 27.[2] "Completion of the Hospital

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[2] Plaintiff defines "Price" as "the amount actually paid by the Patient for surgical services." *Id.* at ¶ 7.

ASC, absent competition by the plaintiff ASC, was not in the economic interest of the Hospital because Hospital revenue would not be increased by the further investment required to complete the Hospital ASC. The Price for Outpatient Surgical Services would remain essentially the same if the Hospital, upon completion, chose to maintain the mixed use OR Price option for Medicare patients or would decrease significantly if the Hospital then chose the ASC price option for Medicare patients." *Id.* at ¶ 28. Likewise, "the economic interest of the interest of the physicians group was to prevent establishment of the Plaintiff ASC to preserve the status quo in which they controlled and monopolized the scheduling and availability of Hospital OR time and, thereby, of all surgery performed in Armstrong County. The Plaintiff ASC would provide an alternative facility at which numerous other readily available physicians and practitioners, whether on the medical staff of the Hospital or not, could perform outpatient surgery in Armstrong County at a significantly lower Price for Outpatient Surgical Services." *Id.* at ¶ 30.

"The intended results of Defendants' agreement, combination and conspiracy were accomplished because they became controlling factors in the Department and Board denial of the CON for the Plaintiff ASC. Such denial preserved the non-competitive status quo for the benefit of the Hospital and the Physician Group, individually and collectively, by preventing or reducing potential competition in Armstrong County to the Physicians Group in providing medical services for outpatient surgery and to the Hospital in providing Outpatient Surgical Services." *Id.* at ¶ 31.

In November of 1993. the Hospital provided extensive information concerning its ASC without ever advising the

Department that construction had been stopped prior to June of 1993 and had not been resumed. In this regard the Hospital misrepresented that its ASC was either available for use or would be available for use shortly. *Id.* at ¶ 35. The physician group letters also made the representation that the Hospital's ASC provided the highest quality medical care at the most reasonable cost when in fact the Hospital's ASC "did not exist then and would never exist." Plaintiff physicians also misrepresented that plaintiff's ASC would duplicate services already being provided, "when, in fact, the Hospital ASC did not exist and the Hospital prices for Outpatient Surgical Services provided in its Mixed Use ORs were substantially higher than the prices which would be charged at the plaintiff ASC.." *Id.* at ¶ 36. At the time these representations were made all defendants understood that the construction on the Hospital ASC had stopped, that construction had not been resumed, that there was no plan or commitment to resume construction and that the Hospital had no intention to complete its ASC if plaintiff's application with the Department were to be denied. *Id.* at ¶ 37.

The Department determined that Armstrong County constituted the appropriate service area in which to measure the need for plaintiff's proposed ASC.. *Id.* at ¶ 39. Armstrong County has a high population of elderly individuals and a low average household income as does the immediately surrounding portions of Butler, Clarion, Indiana and Westmoreland Counties. *Id.* at ¶ 40. Approximately 63% of all surgery performed at Armstrong County is on Medicare patients. *Id.* at ¶ 41. In Armstrong County there were only six mixed ORs at the Hospital and no independent ASC. There likewise was no ASC in Butler County, Clarion County or Indiana County. The closest ASC ORs in Westmoreland County

were located approximately 50 miles from Kittanning, Armstrong County, by secondary roads. The closest free-standing outpatient ORs in Allegheny County were approximately 40 miles from Kittanning by secondary roads.

Fewer outpatient surgery procedures were performed in Armstrong County in 1993 than in any year between 1986 and 1992.. *Id.* at ¶ 46. Outpatient surgery at the Hospital was limited by over utilization of its six ORs and by the demands of inpatient surgery. *Id.* at ¶ 47. Thus, for outpatient surgery, the residents of Armstrong County must either (1) use the Hospital and pay its higher prices or (2) travel a distance to find a lower priced ASC (all with the costs and inconvenience of location, time, travel, possible use of unfamiliar physicians, and so forth) or (3) elect not to undergo the surgery. *Id.* at ¶ 48.

"Medicare reimbursement (i.e., Price) for surgical services provided by health care providers is established by the Health Care Finance Administration of the Department of Health and Human Services, of the United States.. The Medicare price for surgical services provided at an ASC is significantly less than the Medicare Price for the equivalent surgical services performed in Hospital Mixed Use ORs or in a hospital-owned ASC which elects to charge the Mixed Use Price." *Id.* at ¶ 50. The Medicare prices are used by third party payers to establish the prices which will be used for reimbursement of outpatient surgical services, and such providers likewise provide for significantly lower reimbursement when the surgery is performed at an ASC as opposed to a hospital. *Id.* at ¶ 51. Medicare pays only 80% of the Medicare price and the patient is responsible for the balance. Because of the manner in which the patient copayment is calculated, such copayments are on the average significantly higher than 20% of the Medicare price. *Id.* at ¶ 52.

"At the time of the Department Hearing, the average Price for Outpatient Surgical Services provided by the Hospital ORs was approximately $400.00 higher per procedure than the Price which would have been paid at the Plaintiff ASC, or at a similar non-hospital ASC. The average Medicare 20% copayment Price was approximately $455.00 higher per procedure at the Hospital than it would have been in the Plaintiff ASC or a similar non-hospital ASC. Because the average price of Outpatient Surgical Services used in the comparison was less than $800.00 at the ASC, the savings for a Medicare Patient would have been in total over 50% of the Hospital price and for a non-Medicare Patient around one-third of the Hospital price." *Id.* at ¶ 53. Based upon the outpatient surgeries performed in Armstrong County in the fiscal year of 1993, the price savings from using a local ASC could have netted more than $2,800,000.00 yearly. *Id.* at ¶ 54. Defendants' illegal agreement prevented any of these savings in conjunction with outpatient surgical services performed in Armstrong County. *Id.* at ¶ 55.

Plaintiff was injured in its business as a result of the defendants' illegal agreement, including the denial of the CON and the concomitant ability to establish and operate an ASC. The delay in securing the required CON, if ultimately granted, increased costs in pursuing the application for a CON. Plaintiff also suffered the loss of value of the CON (or a reduction in its value if and when it ultimately is granted), the complete loss of plaintiff's ASC or a reduction of its value, the complete loss or reduction in the income and cash flow which plaintiff would have received from operating its ASC and other related losses. *Id.* at ¶ 56. Plaintiff projected that after a loss during the first year of operation, it would have generated an operating profit before taxes and interest during the second year of operation and its profits would

increase thereafter. *Id.* at ¶ 58. Plaintiff requests a judgment against defendants jointly and severally for all monetary damages suffered, to be trebled as required by law, and for costs and attorney's fees generated as a result of defendants' illegal agreement.

Plaintiff essentially asserts that the Hospital and the physicians group, by proximately causing the denial of the CON, caused a restraint of trade in Armstrong County. No other ambulatory surgical center exists in Armstrong or in neighboring Butler, Clarion, or Indiana counties. Plaintiff projects that its ambulatory surgery center would have offered lower costs than the Hospital. These lower costs would have benefitted third-party insurance payers and Medicare, as well as Armstrong County patients. Plaintiff avers that it was injured in the amount of expected profits after its second year of operation.

II.

The Hospital and the physician defendants move to dismiss on the ground that their conduct is immune from liability under the Sherman Act due to *Noerr-Pennington* immunity, which immunizes anticompetitive conduct from antitrust liability when it is done in an effort to petition a governmental body to act. They argue that the doctrine applies because the basis for plaintiff's claims is defendants' petitioning of the Department in an effort to persuade it to deny plaintiff's application. Plaintiff argues that the defendants' conduct falls outside of the protection provided by the *Noerr-Pennington* doctrine because it constituted intentional misrepresentations made to a quasi-judicial body and constituted a group boycott of potential competition, thereby resulting in an injury to the Medicare/surgery market in Armstrong County.

Defendants also move to dismiss on the ground that their conduct was not the proximate cause of plaintiff's asserted injuries. They argue that plaintiff's injuries were caused solely by the Department's decision to deny plaintiff's application and the subsequent affirming of the denial by the Board. Plaintiff, however, claims that misrepresentations made by the defendants to the Department were controlling factors in its decision to deny plaintiff's application, thus making the misrepresentations a proximate cause of plaintiff's asserted injuries.

In response to defendants' motions, plaintiff has summarized the case and the alleged injuries as follows:

> [This case] is about the derailment of that project by (1) the calculated, concerted and illegal actions of the Defendant Hospital (with the only operating rooms in the county) and the 19 Defendant Physicians (who perform almost all of the surgery performed in the county) in banding together and agreeing to boycott Plaintiff's facility, and (2) the Defendant Hospital operating a phantom Hospital Ambulatory Surgery Center which the Defendant Physicians agreed to use exclusively. It is about presenting that evidence to the Pennsylvania Department of Health at the hearing in October 1993 for the purpose of defeating Plaintiff's application to build its Ambulatory Surgery Center because (1) the Defendant Physicians' boycott would make Plaintiff's facility economically not viable and (2) the phantom Hospital Ambulatory Surgical Center which the Defendant Physicians had agreed to use eliminated the need for the Plaintiff Ambulatory Surgery Center.
>
> [This case] is about the fact that today, neither the defendant Hospital Ambulatory Surgery Center nor the Plaintiff Ambulatory Surgery Center exist.

> It is also about the fact that as a result, the residents of Armstrong County continue to pay a very high price for outpatient surgery performed in the Hospital (about $1,600,000 more yearly for all outpatient surgery and an *additional* $1,200,000 more yearly for Medicare patients 20% copayment obligations). It is also about the fact that the only beneficiaries of what happened are the Defendant Hospital and the 19 Defendant Physicians, who have retained their monopolistic control of all surgery in Armstrong County and all the benefits flowing from such control.

Plaintiff's Answer and Brief in Opposition at p. 2.

The results of the Defendants' actions thus far are:

1. The group boycott of the Plaintiff ASC has prevented any local competition for the surgical services provided by the Defendant Hospital.

2. The group boycott of the Plaintiff ASC has permitted the Defendant Hospital to maintain its total monopoly of all surgical services in Armstrong County.

3. The group boycott of the Plaintiff ASC, by preventing an alternative site for outpatient surgery, has blocked meaningful competition with the Defendant Physicians by other physicians for outpatient surgery performed in Armstrong County.

4. The group boycott and the Defendant Physicians commitment to use the Hospital ASC has forced the residents of Armstrong County to pay the higher Defendant Hos-

> pital's prices for all outpatient surgical services by preventing price competition.

Id. at pp. 7-8.

On a motion to dismiss under Fed.R.Civ.P. 12(b)(6) "[t]he applicable standard of review requires the court to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989). Further, the plaintiff is entitled to the benefit of the doubt in determining whether the complaint should be dismissed. Dismissal of a complaint is proper only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 444 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The question is not whether the plaintiff will ultimately prevail; instead, it is whether the plaintiff can prove any set of facts consistent with the allegations of the complaint which would show that the plaintiff is entitled to relief. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994); *In re Meridan Securities Litigation*, 772 F.Supp. 223, 225 (E.D.Pa. 1991). While the focus in making this assessment is on the allegations set forth in the pleadings, "matters of public record, orders [and] exhibits attached to the complaint" also may be considered. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994) (*citing* 5A Wright & Miller, *Federal Practice & Procedure: Civil 2d*, § 1357; *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 812 (3d Cir. 1990)).

III.

In 1979 the Pennsylvania Legislature promulgated the Health Care Facilities Act ("Act"), 35 P.S. § 448.101 *et seq.* The legislature identified the following general purpose of the Act:

> The General Assembly finds that the health and welfare of Pennsylvania citizens will be enhanced by the orderly and economical distribution of health care resources to prevent needless duplication of services. Such distribution of resources will be furthered by governmental involvement to coordinate the health care system. Such a system will enhance the public health and welfare by making the delivery system responsive and adequate to the needs of its citizens, and assuring that new health care services and facilities are efficiently and effectively used; that health care services and facilities continue to meet high quality standards; and, that all citizens receive humane, courteous, and dignified treatment. In developing such a coordinated health care system, it is the policy of the Commonwealth to foster responsible private operation and ownership of health care facilities, to encourage innovation and continuous development of improved methods of health care and to aid efficient and effective planning using local health systems agencies. It is the intent of the General Assembly that the Department of Health foster a sound health care system which provides for quality care at appropriate health care facilities throughout the Commonwealth.

35 P.S. § 448.102. In carrying out its planning and review activities the Department is to "foster competition to promote cost efficiency, quality and access to care." 35 P.S. § 448.202. It also is required to "encourage coop-

erative health care arrangements which focus on the health care needs of a health planning area and foster the prudent and economical control of the area's resources" and to "encourage innovations in the financing and delivery systems for clinically related health services that will promote economic behavior by consumers and providers of clinically related health services that leads to appropriate investment in, supply and use of health services." *Id.*

Section 201[3] of the Act addresses the powers and duties of the Department. In conjunction with the Health Policy Board and after approval of the Governor, the Department is to research, prepare and publish annually a state health services plan for the Commonwealth. 35 P.S. § 448.201(6). It has exclusive jurisdiction over all health care providers. It is "to receive, log and service all applications for certificates of need or amendments thereof and approve or disapprove the same." 35 P.S. § 448.201(9). The Department also is vested with the authority to adopt and promulgate regulations in furtherance of the encouragement of competition in the health care market. 35 P.S. §§ 4448.201(12) & 448.202. At all relevant times appeals regarding the decision of the department were heard by the State Health Facility Hearing Board and the Commonwealth Court of Pennsylvania, respectively. *See* 35 P.S. §§ 448.507 & .508.[4]

In its application to the Department plaintiff asserted that there was an over use of ORs at the Hospital, a need for more ORs in Armstrong County, and that its facility would provide the same or equivalent services at lower

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[3] 35 P.S. § 448.201.

[4] Appeals of Department decisions not resolved by June 30, 1996, were transferred to the Department of Health to be adjudicated in accordance with 71 P.S. § 532(n).

costs. After evaluating the submitted evidence and additional evidence offered at a public hearing, the Department concluded that plaintiff had failed to submit sufficient evidence to support its claim for the need of the new outpatient surgery center. The department's official recommendation set forth two reasons for the denial:

1. The project is not consistent with the state health plan criteria for the review of ambulatory surgical services; and

2. The project does not substantially meet the requirements of § 707 [5] of the Health Care Facilities Act.

According to the state health plan, the Department is to consider need, utilization, and cost efficiency in determining whether to grant an application for a CON. After considering the evidence presented by plaintiff and the Hospital, the Department concluded that "over utilization of existing capacity ha[d] not been demonstrated" and accordingly found no need to construct additional ORs. The Department also found it unlikely that plaintiff would meet its volume projections primarily because the statistics available from the previous five years of similar services in Armstrong County did not support plaintiff's projected growth rate in the demand for such services. It reasoned, consequently, that the cost of procedures at the proposed ASC likely would have to be increased. On the basis of the two findings above, the department disapproved the project.

Plaintiff appealed the Department's decision to the State Health Facility Hearing Board ("Board"). It conducted formal hearings on May 3 and August 31, 1995. Plaintiff argued to the Board that it would be able to

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[5] 35 P.S. § 448.707.

meet its projected volume with "migrating" patients from surrounding counties and also by performing procedures that were not available at the Hospital. These arguments were in conflict with plaintiff's application, which indicated that the proposed ASC primarily would be supported by the local Armstrong County patient population. In addition, the procedures not performed by the Hospital that plaintiff advanced to the Board were not part of its original CON application and therefore were not part of its projected estimate of necessary costs.

After evaluating the record, the Board made the following findings of fact. Plaintiff's application was based upon a service area which was equivalent to that of the Hospital's; plaintiff's ASC was to be located in the immediate vicinity of the Hospital. The patient population base from which the new out-patient surgery center would draw its patients would be the same as that of the Hospital. Plaintiff's application projected a need for seven operating rooms in Armstrong County by the year 2000; the need-projection formula in the State Health Plan indicated that 6.5 operating rooms were needed.. The Hospital has six operating rooms and an additional room which is used for procedures such as endoscopies, colonoscopies and sigmoidoscopies.. Plaintiff's projected growth rate was well in excess of historical data supplied by the Department pertaining to the previous five-year growth rate for ambulatory surgery in Armstrong County. Plaintiff's attempt to support its projected growth rate by asserting that its ASC would attract patients from surrounding counties and/or would be attained by performing surgeries not performed by the Hospital was inconsistent with its application and unpersuasive. Plaintiff's projected growth rate also was undermined by the accessible ASCs located in Allegheny and Westmoreland Counties. The

negative impact of plaintiff's ASC on the Hospital was not addressed adequately in plaintiff's application. After plaintiff's application was submitted "and for whatever reason" support for the proposed ASC had eroded among the physicians who initially had supported the application or whose participation would be needed. Based upon the above, the Board determined "that the volume of procedures likely to be performed at the proposed facility [was] insufficient to support a finding of need for two additional operating rooms in Armstrong County."

Plaintiff appealed the Board's order to the Commonwealth Court of Pennsylvania. The Commonwealth Court affirmed the decision of the Board on the grounds that the Board's findings were supported by substantial evidence and there was no error in the Board's application of the facts to the law or its conclusions of law. It also rejected plaintiff's argument that the Board had failed to "foster competition to promote cost efficiency, quality and access to care" as mandated by 35 P.S. § 448.202 because the argument essentially was a challenge to the Board's prerogative to weigh the evidence, resolve the conflicts created and make conclusions of law based upon its findings of fact.

IV.

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). It prevents contracts or combinations which unreasonably restrain competition. *Id.* (*citing Standard Oil v. United States*, 221 U.S. 1 (1912)). Ultimately, its goal is to yield the "best allocation of our economic resources, the lowest prices, the highest quality and the greatest material

progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions." *Id.* at 4.

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. To sustain a cause of action under § 1, the plaintiff must prove: "(1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy." *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991), *cert. denied*, 505 U.S. 1221 (1992) (*quoting Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978)).

Section 2 of the Sherman Act provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony.

15 U.S.C. § 2. Monopoly power is the power to control prices or to exclude competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). In order to establish a claim for attempted monopolization, a plaintiff must show that defendant (1) had specific intent to monopolize the relevant market, (2) engaged in anticompetitive or exclusionary conduct and (3) possessed

sufficient market power to come dangerously close to success. *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 112 (3d Cir. 1992).

Immunity from antitrust liability as a result of petitioning the government for redress has its roots in the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 341, 350 (1943). There, the Court determined that a state cannot be held liable under the Sherman Act for anticompetitive restraints imposed "as an act of government." *Id.* at 352. The rationale advanced was that there was "nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 351.

The Supreme Court extended the *Parker* state action immunity doctrine to private individuals in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961), where it held that "no violation of the [Sherman] Act can be *predicated* upon mere attempts to influence the passage or enforcement of laws." *Id.* (emphasis added). In this regard it determined that "two or more persons [may associate] together in an attempt to persuade the Legislature or Executive to take particular action with respect to a law that would produce a restraint or monopoly." *Id.* at 136. The Court rejected the proposition that immunity for petitioning activities should be limited to injuries which flowed directly from the governmental action at issue and held that injuries which were "incidental" to private parties' efforts to petition the government likewise are immune. In *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965), the Court further explained that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." In subsequent cases the Court recognized that *Noerr* immunity

extends to attempts to influence administrative, executive and judicial actions. *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). This doctrine has become known as *Noerr-Pennington* immunity.

In *California Motor Transport*, the Court extended the principles of *Noerr* citizens seeking action from administrative agencies and courts. It reiterated that an exception to the *Noerr-Pennington* doctrine exists based upon "misrepresentations . . . in the adjudicatory process or the pursuit of a pattern of baseless, repetive claims . . . without probable cause, regardless of merit." In *Noerr* the Court noted that activity "ostensibly directed toward influencing governmental action" did not qualify for immunity if it was "a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Noerr* 365 U.S. at 144. In *California Motor Transit*, the Court held that allegations that one group of highway carriers "sought to bar . . . competitors from meaningful access to adjudicatory tribunals and so usurp that decisionmaking process" by commencing proceedings and actions without regard to merit or legal justification revealed a "sham" falling outside *Noerr* immunity. 404 U.S. at 512. Another type of "sham" exception was recognized by the Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), where it held that when the *process* and not the outcome of petitioning a governmental body is used as an anticompetitive weapon, the activity is not immunized. *Id.* at 398.

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), the Court observed that the application of antitrust petitioning immunity could not be resolved merely by ascertaining whether the asserted injury

was "incidental" to an effort to influence governmental action. In this regard the Court explained that this form of immunity attaches only when the anticompetitive conduct constituted a valid effort to petition the government and cautioned that "[t]he validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity." *Id.* at 499-500.

In *F.T.C. v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411 (1990), the Court addressed a scenario where it found that conduct in the *process* of petitioning a government body fell outside of the doctrine of petitioning immunity. There, a group of lawyers in private practice who regularly were appointed as Criminal Justice Act ("CJA") counsel for indigent defendants in the District of Columbia agreed to stop providing such representation until the district increased their compensation. The boycott caused a severe impact on the district's criminal docket and the government acceded to the lawyers' demands. Thereafter the Federal Trade Commission filed a complaint against the trial lawyers association and four of its officers alleging that they had entered into a conspiracy to fix prices and to conduct the boycott, which constituted unfair methods of competition in violation of the Federal Trade Commission Act. The Federal Trade Commission determined that the boycott was illegal *per se* and prohibited the trial lawyers from initiating similar boycotts in the future. The United States Court of Appeals for the District of Columbia vacated the FTC's order, reasoning that while the boycott constituted a classic restraint of trade in violation of § 1 of the Sherman Act, the boycott was meant to convey a political message to the public and thus was protected under the First Amendment.

The Supreme Court reversed. After explaining that *Noerr* was based upon "the intended consequences of

public action" and the boycott under consideration "was the means by which respondents sought to obtain favorable legislation," the Court rejected the trial lawyers' contention that their conduct was immune. It explained:

> Indeed, respondents' theory of Noerr was largely disposed of by our opinion in Allied Tube & Conduit Corp. v. Indian Head, Inc. 486 US 492, 100 L Ed 497, 108 S Ct 1931 (1988). We held that the Noerr doctrine does not extend to "every concerted effort that is genuinely intended to influence governmental action." 486 US, at 503, 100 L Ed 2d 497, 108 S Ct 1931. We explained:
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> > "If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental rate making or price supports. . . . Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. . . . Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action." . . .

F.T.C., 493 U.S. at 867 (citations omitted). It likewise rejected the trial lawyers' claim that their activity was protected under the First Amendment, reasoning that "[t]he activity that the FTC order prohibits is a concerted refusal by CJA lawyers to accept any further assignments until they receive an increase in their compensation; the undenied objective of their boycott was an economic

advantage for those who agreed to participate." *Id.* at 426. It further explained that First Amendment immunity was "not applicable to a boycott conducted by business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.'" *Id.* at 427 (*citing Allied Tube & Conduit Corp.*, 486 U.S. at 508). It "reaffirmed the *government's* power to regulate [such] economic activity" and noted that this proposition "applies with special force when a clear objective of the boycott is to economically advantage the participants." *Id.* at 428. Accordingly, it concluded that "[r]espondent's concerted action in refusing to accept further CJA assignment until their fees were increased was thus a plain violation of the antitrust laws." *Id.*

Recently, the Court has further defined the sham exception to traditional petitioning immunity. In *City of Columbia v. Omni Advertising, Inc.*, 499 U.S. 365 (1991), the Court explained that "*Parker* and *Noerr* are complimentary expression of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government." *Id.* at 383. The Court rejected the proposition that an exception to the state immunity doctrine exists for "conspiracy claims" implicating state actors and reiterated "that, with the possible market participant exception, *any* action that qualifies as state action is *'ipso facto* . . . exempt from the operation of the antitrust laws." *Id.* at 379. It further explained:

> [t]he "sham" exception to Noerr encompasses situations in which persons use the governmental process-as opposed to the outcome of that process-as an an-

> ticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. . . . A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, . . . not one "who 'genuinely seeks to achieve his governmental result, but does so through improper means, ...'"

Id. at 398 (citations omitted).

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 123 L.Ed.2d 611 (1993), the Court examined a claim that litigation was commenced without a reasonable belief in its merit and was therefore "sham" litigation upon which antitrust claims could be founded. The Court explained that in order for a lawsuit to qualify as sham, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors*, 123 L.Ed.2d at 624. 'Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* Under this second part of the analysis, a court

> should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor," *Noerr* . . . through the "use [of] the governmental process—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Omni* . . . . This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability.

Id. (emphasis in original). The Court held "that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." *Id.* at 621.[6]

The United States Court of Appeals for the Third Circuit recently has examined the state action immunity doctrine and the concomitant petitioning immunity which attaches to state regulatory activity protected by the doctrine. In *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994), the court examined an electric company's claim of state action immunity asserted against oil dealers' antitrust claims challenging the electric company's use of incentive programs designed to encourage the use of electric heat in new housing construction. Private party conduct enjoys state action immunity if the party claiming it shows that its conduct satisfies two requirements: (1) the state has articulated a clear and affirmative policy to allow anticompetitive conduct, and (2) the state provides active supervision of the anticompetitive conduct undertaken. "Both [elements] are directed toward ensuring that particular anticompetitive mechanisms operate because of deliberate and intended state policy." *Id.* (*quoting F.T.C. v. Ticor Title Insurance Co.*, 504 U.S. 621, —— (1992)).

A state policy need not be aimed at restraining competition in order to satisfy the first element. It is satisfied if (1) the suppression of competition is the foreseeable result of what a statutory scheme authorizes and (2) the legislature contemplated the kind of action of which the plaintiff complains. *Id.* at 1266-67. Mere neutral au-

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[6] Because there was probable cause to initiate the litigation and it was not "so baseless that no reasonable litigant could realistically expect to secure favorable relief, []" the court declined to decide "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations" committed during the adjudicatory process. *Id.* at 625 n.6.

thorization of the anticompetitive conduct is not enough if the foreseeable result requirement is not satisfied. *Id.* at 1267-68. Whether a particular practice is established pursuant to a state policy is a question of state law. *Id.* at 1268. Bureaucratic approval of a particular practice which was not revealed in the approval process or approved based upon an active misrepresentation of the practice may preclude satisfaction of this element. *Id.* at n.9.

The active supervision prong requires the party asserting immunity to establish "actual state involvement" in the activity in question. State officials must "have and exercise power to review particular anticompetitive acts of private parties and disprove those that fail to accord with State policy." *Id.* at 1270 (*quoting Ticor*, 504 U.S. at ——). Whether state officials met a normative standard such as efficiency is not the purpose of this inquiry. Instead, the inquiry is:

> whether the State had exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate State intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

Id. at 1270-71.

In *Yeager's Fuel* the oil dealers alleged that the electric company had used its status as sole provider of electricity in the region to monopolize the home heating market through (1) the use of cash incentives for each new

home in which an electric heat pump was installed and (2) the electric company's practice of offering reduced electric rates for homes equipped with electric heat pumps and residential off-peak thermal heating systems. The oil dealers further alleged that some of the electric company's incentive offers were conditioned on the developers agreeing to build an entire development with only electrical heating units. The court agreed "with the district court that [the electric company was] immune from antitrust liability for offering builders and developers cash grants and other incentives, and for offering consumers a special electric rate for installation of high-efficiency electric heating systems" because the electric company had met its burden in establishing entitlement to state action immunity. It also determined, however, that the electric company was not immune from antitrust liability to the extent that it made these offers contingent upon all-electric development agreements.[7]

In *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 107 F.3d 126 (3d Cir. 1997), a non-accredited law school brought an antitrust action against the American Bar Association ("ABA") and a number of related entities and individuals, alleging that the defendants conspired to organize and enforce a group boycott in order to monopolize legal education, law school accreditation and the licensing of lawyers. The trial court held that the defendants were not subject to antitrust liability for the plaintiff's principal alleged injury, a competitive disadvantage in recruiting students, because the

[7] The electric company did not argue on appeal that it was immune from antitrust liability for actions undertaken in connection with the all-electric development agreements. Instead, it urged the court to examine the merits of this claim. The court declined to do so in light of the fact that it was unclear on the record whether appropriate discovery had been undertaken on this claim. *Id.* at 1272.

decisions of the individual states to prohibit graduates of unaccredited law schools from taking their bar examinations caused the plaintiff's asserted injury.

Because the inability of the law school's graduates to sit for state bar examinations was caused by the decisions of the states in establishing the requirements for licensing, and thus the injury asserted was an incidental effect of the state's sovereign authority, "the clear articulation and active supervision requirements" for private party state action immunity were "inapplicable." *Id.* at 1036. Under these circumstances the law school's allegation that it had been injured by the ABA's standards necessarily had to fail. *Id.*

The law school also claimed that it had been injured "by stigmatic effect in the market place of the denial of accreditation." *Id.* at 1037. Relying on *Allied Tube*, the law school asserted that its stigma injury arose from the ABA's campaign seeking to persuade the states to follow and adapt its standards and that there was not recognizable petitioning activity involved, thereby precluding *Noerr* immunity. The Court distinguished *Allied Tube* on the ground that it "involved the dubious commercial practices of economically interested actors that had an impact on the political process" and "not political activity that had an impact on commerce." The Court observed that where state action is at issue *Noerr* immunizes "any solicitation of government action[,]" regardless of its success or the lack thereof. *Id.* at 1037 n.11. The ABA's present day efforts to communicate its accreditation decisions to the states with a desire that the states continue to give the ABA's decisions credence constituted "a legitimate, although somewhat indirect," form of petitioning activity and thus the ABA's conduct was immunized under *Noerr* because the asserted stigma injury was "incidental" to the ABA's petitioning activity. *Id.* at 1037-38.

The law school also asserted injuries flowing directly from the ABA's enforcement of its standards: a price-fixing claim resulting from faculty salaries and a boycott claim arising from accredited schools' limitations pertaining to accepting transfers or graduate students from unaccredited schools. The court declined to accord immunity for this conduct, explaining that

> [a]lthough the ABA is immune from liability attributable to the state action in requiring applicants for the bar examination to have graduated from an ABA-accredited law school and from any stigma injury resulting from the denial of accreditation under the Noerr petitioning doctrine, the ABA is not immune in the actual enforcement of its standards. The state action relates to the use of the results of the accreditation process, not the process itself. The process is entirely private conduct which has not been approved or supervised explicitly by any state. Thus, the ABA's enforcement of an anticompetitive standard which injures [the plaintiff] would not be immune from possible antitrust liability.

Id. at 1038. Because the law school had failed to demonstrate that it suffered injury from the non-immunized conduct, the Court affirmed the district court's determination that no genuine issue of fact remained on these claims. *Id.* at 1040-41.

V.

Plaintiff complains of defendants' conduct in conspiring with one another in providing statements of intent and writing letters to prevent plaintiffs from obtaining authorization for a project from a state administrative agency acting under a comprehensive regulatory system. Plaintiff argues that the Department of Health is a quasi-judicial body and not a quasi-legislative body, and as such, the

misrepresentations are actionable. Plaintiff also argues that the "group boycott" was illegal and therefore not protected by *Noerr-Pennington* immunity under *F.T.C. v. Trial Lawyers Association.*

Plaintiff's claims, which are predicated upon the contention that its and the "market's" injuries were the result of defendants' private non-immunized conduct, fail as a matter of law. The decision to deny plaintiff's application was the product of state decision-makers based upon the criteria of a statutory scheme and its mandated state health plan. The denial of plaintiff's application for a CON and the consequences of that denial on the market were the result of direct state administrative action which was reviewed by a state appellate court. It is difficult to posit a more classic example of a restraint upon competition as a result of valid governmental action. It follows that plaintiff's claims of injury necessarily must fail. *See Massachusetts School of Law,* 107 F.3d at 1036-37.

Even assuming *arguendo* that the clear articulation and actual supervision requirements are applicable, they are established adequately. Pennsylvania's Health Care Facilities Act is a legislative enactment which constitutes an affirmatively authorized state policy. The purpose of the Act and its accompanying regulatory scheme is to provide for the "orderly and ecnomical distribution of health care resources," to "coordinate the health care system" and to *assure* "that new health care services and facilities are efficiently and effectively used." The Department's mission is to "foster a sound health care system which provides for quality care at appropriate health care facilities throughout the Commonwealth." Its duties include fostering "competition to promote cost efficiency, quality and access to care" and "foster the prudent and economical control of [an] area's resources" for the benefit of *all*

citizens in the region. Applications to compete in a regional state market are examined at two administrative levels, which develop certified records based upon submitted materials, investigations and public hearings. Interested citizens and entities are given an opportunity to be heard. The Department has exclusive state jurisdiction over health care providers and the approval or disapproval of applications for certificates of need. Thus, the suppression of competition is a foreseeable result of what the statutory scheme authorizes. The legislature specifically contemplated the kind of action of which plaintiff complains.

The active supervision requirement likewise is satisfied. The Department is required to make an independent investigation into the facts and to make its own findings based upon a number of criteria. *See* Recommendation Report of Department's Planner at pp. 1-8 attached as Exhibit "B" to Defendant Armstrong County Memorial Hospital's Memorandum in Support of Motion to Dismiss. "When reviewing an approval or disapproval of a CON application, the board is required to make findings of fact, including credibility determinations that resolve conflicts in the evidence, and then to make conclusions of law based upon its findings of fact." *Armstrong Surgical Center, Inc. v. Pa. Dept. of Health*, 890 C.D. 1996 (Pa. Cmwlth Jan. 27, 1997) at p. 14 (citing in support *Mercy Regional Health System v. Pa. Dept. of Health*, 645 A.2d 924 (Pa. Cmwlth 1994)). Making credibility determinations necessarily entails the examination and assessment of evidence for probativeness, bias, reliability and misleading aspects. *Cf. Id.* ("Accordingly, it is well within the board's province, as fact finder, to weigh the evidence based on credibility determinations."). Accordingly, the active supervision prong is satisfied.

Under the circumstances *Noerr* immunizes the activities of the defendants in petitioning for favorable governmental action. The "dubious" practices of the economically interested actors constituted political activity which had an impact on local commerce. There was a reasonably objective basis for success in the opposing plaintiff's application. The defendants' subjective intent is irrelevant. *Professional Real Estate Investors,* 123 L.Ed.2d at 624. The injuries of which plaintiff complains were at a minimum "incidental" to defendants' petitioning activities. *Noerr* immunized "any solicitation" made during this process, regardless of its accuracy.

In addition, plaintiff's contention that defendants told lies in the state adjudicatory process which substantially affected the validity of the state process legally is unsupportable. The decisions of the state officials at each step of the process are reflected in public documents which speak for themselves. The Board was well aware of the circumstances surrounding the Hospital's "phantom" ASC and that construction had ceased on the building. Pursuant to its independent fact-finding authority it determined that "[a]lthough the building is currently being used as a storage facility, there was credible evidence that the project has not been abandoned." *In re Armstrong Surgical Center, Inc.,* S.H.F.H.B., CN93-029, Feb. 13, 1996 at 14 n.9. It also was well aware of defendants' asserted self-interest with regard to the assertions advanced during the review process. *Id.* at 17. There were multiple independent findings and conclusions which were in accordance with state law. The necessary judicial assessment of the state records establish on the merits that it would be error to permit a jury in this action to consider and determine that the specific "conduct" isolated by plaintiff legally caused the injuries asserted.

Plaintiff's reliance on *Trial Lawyers Association* also is unavailing. Defendants did not refuse to perform surgeries until the federal Medicare rates were increased; defendants did not refuse to make their services available until the state bureaucracy acceded to some economic demand. The physician defendants merely posited into the state adjudicatory process for consideration a statement of future intent; the Hospital merely posited evidence supporting the proposition that it was prepared to meet the future out-patient surgery demands of the region as they arose. Defendatns cannot control the states' subsequent decisions in coordinating and managing effectively the region's surgical market. Defendatns likewise did not use the state process as a weapon and attempt to "bar . . . competitors from meaningful access to adjudicatory tribunals and to usurp that decisionmaking process . . . ." *Professional Real Estate Investors*, 123 F.Ed.2d at 621. Defendants' petitioning activity was not objectively baseless. Under these circumstances a boycott claim necessarily fails because there has been no antitrust injury. *Compare Massachusetts School of Law*, 107 F.3d at 1041 (refusal to aid by selectively denying participation in economic activities where the actor lacks monopoly power is not injury with which antitrust laws are concerned); *Omni*, 499 U.S. at —— (although inimical intent "may render the manner of lobbying improper or even unlawful, [it] does not necessarily render it a 'sham' "); *Burns v. Cover Studios, Inc.*, 818 F.Supp. 892 (W.D.Pa. 1993) (Anticompetitive conduct for the purposes of the antitrust laws is the type of "conduct designed to eliminate competition, and not just a competitor.") (*citing Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982)).

The Supreme Court has not clarified definitively when state action immunity and/or petitioning immunity should

be treated as a doctrine of preemption as opposed to an affirmative defense. *See Yeager's Fuel,* 22 F.3d at 1266. The party asserting immunity bears the burden of proof on any factual issue underlying its application. *Id.* Where the record demonstrates that a defender is entitled to state action immunity, the claims which are based upon immunzed conduct may be dismissed prior to discovery. *Id.* at 1272; *see also Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (affirming trial court's dismissal of complaint predicated upon conduct which constituted state action). Where the conduct is exempt under the state action immunity doctrine, a determination of whether petitioning immunity attaches is unnecessary. *Hoover*, 466 U.S. at 574 n.25.

Here, state action resulted in the denial of plaintiff's application. Under the circumstances plaintiff may not predicate claims on the basis of this conduct, and even assuming that defendants must meet an affirmative burden of proof in seeking the various forms of immunity claimed, the record demonstrates that defendants have met their burden as a matter of law at this juncture. Accordingly, defendants' motions to dismiss will be granted.

An appropriate order will follow.

/s/ Gustave Diamond
GUSTAVE DIAMOND
United States District Judge

Date: July 14, 1997

APPENDIX C

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 97-3440

ARMSTRONG SURGICAL CENTER, INC.,
Appellant

v.

ARMSTRONG COUNTY MEMORIAL HOSPITAL; ROGELIO BORJA; RICHARD BOSCO; ZAFAR CHOWDHRY; JEFFEREY DAVID; FRANK DAVIE; EGBERT deVRIES; PAUL L. FREDERICK; JOHN GARROTT; FRANK N. GENOVESE; IRVING KLEIN; DAVID H. KOHL; LEE H. KOSTER; JOHN MARTY; MICHAEL P. ONDICH; KARL R. SALTRICK; WILLIS SHOOK; ANTHONY SMALDINO; PETER SOTOS; JAE T. YANG

On appeal from the United States District Court
for the Western District of Pennsylvania
District Judge: The Honorable Gustave Diamond
(D.C. No. 96-cv-01384)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE,

RENDELL, and STAPLETON* *Circuit Judges*; and SCHWARTZ*, District Judge

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The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of the this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for hearing is hereby DENIED.

Chief Judge Becker, and Judges Sloviter, Mansmann and Roth would have granted rehearing en banc.

By the Court,

/s/ [Illegible]
United States Circuit Judge

DATED: Aug. 30, 1999

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* Vote limited to panel rehearing only.

APPENDIX D

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 890 C.D. 1996

ARMSTRONG SURGICAL CENTER, INC.,
Petitioner

v.

PENNSYLVANIA DEPARTMENT OF HEALTH,
Respondent

Argued: November 18, 1996

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE SAMUEL L. RODGERS, Senior Judge

MEMORANDUM OPINION
BY JUDGE KELLEY
Filed: January 27, 1997

Armstrong Surgical Center, Inc. (Armstrong) appeals from an order of the State Health Facility Hearing Board (board) which affirmed the decision of the Pennsylvania Department of Health (department). The department disapproved Armstrong's certificate of need (CON) application proposing development of a freestanding ambulatory surgical center in East Franklin Township, Armstrong County. We affirm.

On January 16, 1990, the department received a letter from Roger Vega, M.D., proposing construction of an ambulatory surgical facility to be known as the "Kittanning Same Day Surgery Center" in Armstrong County. The department determined that the proposal required a certificate of need.

On March 11, 1991, Armstrong filed a CON application with the department which, among other things, changed the name of the project to "Armstrong Surgical Center, Inc." The application described the project as a free-standing ambulatory surgical center in East Franklin Township, Armstrong County, having operating rooms, a special procedure room and a dental room, which would offer surgical services in specialties such as ENT, gastroenterology, general surgery, gynecology, ophthalmology, orthopedics and urology. Armstrong's CON application was opposed by Armstrong County Memorial Hospital (hospital).

The department held public meetings at which the parties presented oral and documentary information. On November 29, 1993, the department officially informed Armstrong that its CON application was disapproved. The department disapproved the CON application on the grounds that the proposed project did not substantially meet the requirements of section 707 of the Health Care Facilities Act [1] (Act) and the proposed project was not

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1 Act of July 19, 1979, P.L. 130, *as amended*, 35 P.S. § 448.707. Section 707, which sets forth the criteria for review of applications for certificates of need or amendments, provides, in relevant part, as follows:

> (a) An application for certificate of need shall be considered for approval when the department determines that the application substantially meets the requirements listed below:
>
> (1) There is need by the population served or to be served by the proposed service or facility.

[Continued]

consistent with Chapter 29 of the State Health Plan [2] criteria pertaining to ambulatory surgical services.

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[1] [Continued]

> (2) The proposed service or facility will provide care consistent with quality standards established by the State health services plan.
>
> (3) The proposed service or facility will meet the standards identified in the State health services plan for access to care by medically underserved groups, including individuals eligible for medical assistance and persons without health insurance.
>
> (b) The department shall issue a certificate of need if the project substantially meets the criteria of subsection (a)(1), (2) and (3) and the project is consistent with the State health services plan . . . .

[2] A state health plan is defined by regulation as follows:

> A statement of goals for the State health care system based on the Health Systems Plans for the State and approved by the Statewide Health Coordinating Council and the Governor prepared triennially, reviewed annually and revised as necessary. It describes the institutional health services needed to provide for the well-being of persons receiving care within the State, the number and type of resources, including facilities, personnel, major medical equipment, and other resources, including financial resources, required to meet the goals of the plan, states the extent to which existing health care facilities are in need of modernization, conversion to other uses, or closure and the extent to which new health care facilities need to be constructed or acquired.

28 Pa. Code § 401.2.

In 1992, the General Assembly amended the Health Care Facilities Act requiring therein that the Commonwealth adopt a State Health Services Plan. *See* sections 103 and 201(6) of the Act, 35 P.S. §§ 448.103; 448.201(6). However, at the time that the department rendered its decision in this matter, the state health services plan had not been adopted; accordingly, the Act requires that the department apply the state health plan in existence on the effective date of the Act's amendments, along with any subsequent updates to that plan, when reviewing a CON application. *See* section 201(6) of the Act, 35 P.S. § 448.201(6). There is no dispute that the amendments to the Act, particularly amended section 707 of the Act,

Armstrong appealed the department's decision to the board. Formal hearings were conducted on May 3, 1995 and August 31, 1995, after which the board made the following findings of fact.

The hospital is the only health care facility located in Armstrong County. The hospital had six operating rooms in service at the time of the department's decision. In the CON application, Armstrong projected a need for approximately seven operating rooms by the year 2000. Employing actual utilization figures for the current and projected population, the need-projection formula in Chapter 29 of the State Health Plan indicates that 6.5 operating rooms are needed in Armstrong County. The need-projection formula found in Chapter 29 of the State Health Plan indicates need for more operating rooms in Armstrong County than currently exist.

In the CON application, Armstrong equated its service area with that of the hospital and suggested that only data from Armstrong County should be considered by the department in its analysis. At the public meeting, Armstrong stated a belief that all of its patients would likely come from Armstrong County.

According to Armstrong, a majority of the physicians who would utilize the proposed facility are members of the staff of the hospital. The proposed facility would be located in the immediate vicinity of the hospital and would serve essentially the same population as the hospital currently serves. In addition to having six operating rooms, the hospital has a room used for procedures such as endoscopies, colonoscopies and sigmoidoscopies which has been in service since at least 1991.

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are applicable to Armstrong's CON application as the Act was amended after the CON application was submitted, but before the department rendered its decision.

The hospital has partially completed construction of a building on its premises that would house a dedicated outpatient surgical facility. Upon completion of the hospital's outpatient surgical facility, three of its existing operating rooms would be moved into the new building.

The proposed ambulatory surgery center and the one which has been partially constructed by the hospital would serve the same population and would provide essentially the same surgical services. Armstrong's proposed ambulatory surgery center would needlessly duplicate existing facilities and health care services in Armstrong County.

Estimates concerning the number of surgical procedures that a proposed ambulatory surgical facility reasonably expects to perform are vital to the resolution of issues such as need, utilization, cost, and financial feasibility. Armstrong projected that 3,029 procedures would be performed at the proposed facility during the first year and that 4,420 procedures would be performed in the fifth year. Historical data supplied while the application was under consideration by the department showed that ambulatory surgery in Armstrong county grew by only twenty-seven percent during the preceding five-year period.

Armstrong sought to justify its five-year growth projections by asserting that the facility would attract patients from India, Westmoreland, Allegheny and Butler Counties. Existing ambulatory surgical facilities in Allegheny and Westmoreland Counties are accessible to patients in Armstrong and other neighboring counties.

Armstrong sought to justify its five-year growth projections by asserting that the proposed facility would perform certain surgical procedures not currently provided by the hospital, such as radioactive seeding of the prostate gland, lithotripsy and laser treatment of kidney stones.

Although radioactive seedling of the prostate gland requires, among other things, specially-certified personnel, a nuclear medicine license and a storage facility for radium, the costs associated with these items were not included in the CON application. The cost of laser surgery equipment was not included in the CON application.

Armstrong submitted to the department letters (from seventeen physicians who indicated that they would perform approximately 3,475 surgical procedures per year at the proposed facility. Five of the seventeen physicians later withdrew their support and recommended disapproval of the application. Fourteen physicians who had not initially supported the project stated that they would utilize the outpatient surgical facilities at the hospital and that they would not perform any surgery at the proposed facility. The five physicians who withdrew their support and the fourteen physicians who indicated that they would not use the proposed facility perform approximately ninety percent of all surgery at the hospital. All these physicians are on the staff of the hospital.

The hospital provided the department with the historical volume of outpatient surgery performed by the physicians on its staff, which was much lower than the volume projected by Armstrong for those physicians. In order to meet its volume projections, a large amount of Armstrong's surgical volume would necessarily have to come from patients who reside outside of the primary service area and from patients residing in the primary service area who currently "migrate" elsewhere for ambulatory surgery.

ON review requires that a project should be viable and have a reasonable chance of success. The board found that there is insufficient potential in Armstrong County to support Armstrong's volume projections. Armstrong's

volume projections are inconsistent and unpersuasive, and the volume of surgical procedures likely to be performed at the proposed facility is not sufficient to support a finding of need for two additional operating rooms in Armstrong County. The possibility that the proposed facility would have a negative impact on the hospital was not adequately addressed in the CON application.

Based on the above findings, the board concluded that:

1. The exception contained in Recommended Action 29.1.1.1(a) of Chapter 29 of the State Health Plan is applicable to Armstrong's CON application;

2. Armstrong's CON application does not substantially meet the requirement of establishing need for the proposed facility by the population served or to be served in accordance with section 707(a)(1) of the Act; [3]

3. The anticipated volume of ambulatory surgical procedures projected by Armstrong in connection with the CON application is not realistic or attainable under the existing circumstances; and

4. Armstrong's CON application must be disapproved.

On appeal to this court [4] from the board's order, Armstrong raises the following issues:

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[3] The board determined that Armstrong's CON application met the requirements of Section 707(a)(2) and 707(a)(3) of the Act.

[4] In reviewing a decision of the board, this court's scope of review is limited to determining whether the findings of fact are supported by substantial evidence, whether a constitutional violation occurred or whether the decision is based upon an error of law. *Mechanicsburg Rehab System v. Department of Health*, 645 A.2d 372 (Pa. Cmwlth. 1994).

We are cognizant of the Act of February 23, 1996, P.L. ——, (Act No. 10 of 1996, H.B. 272), which, effective June 30, 1996,

1. Whether the board violated the Act by affirming the department's decision denying a CON because need was not established under section 707 (a)(1) of the Act.

2. Whether the board violated the Act by affirming the department's decision denying a CON because the anticipated volume of ambulatory surgical procedures projected in connection with the CON application is not reasonable or attainable under the existing circumstances.

3. Whether board violated the Act by not following the mandate of the first sentence of section 202 of the Act, 35 P.S. § 448.202, that the department shall, in reviewing activities, foster competition to promote cost, efficiency, quality and access to care.

In support of the first issue raised herein, Armstrong argues that it established need under section 707(a)(1) of the Act by meeting the requirements of Recommended Action 29.1.1.1 of Chapter 29 of the State Health Plan. Recommended Action 29.1.1.1 of Chapter 29 of the Senate Health Plan provides that:

> A finding of "No Need" should be made by the Department for any Certificate of Need proposal which would result in a supply of operating rooms in excess of the need specified in Table 29-2 except that further ambulatory surgical capacity will be considered for approval if:
>
> a. a sub-area shows a projected need for additional operating rooms based on the formula in item 4 above; or

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eliminates the Board and places its review functions in The Health Care Policy Board. The replacement of the board has no effect on our decision regarding the board's March 13, 1996 order in this case.

b. the applicant's operating rooms are being used at full capacity (1140 operations per year), and the resulting need justifies at least one full-time operating room; or

c. the proposed ambulatory surgery program represents a less costly and more effective alternative to inpatient surgery, and does not inappropriately increase the total community cost of health care.

Reproduced Record (R.) at 853a.

Armstrong points out that the board determined that exception (a) contained in Recommended Action 29.1.1.1 is applicable to Armstrong's CON application. Armstrong contends that despite this determination by the board, the board embarked on a wide examination of the merits to determine need under section 707(a)(1) of the Act. Armstrong argues that once the board determined that Recommended Action 29.1.1.1(a) was applicable, the board was mandated to find that need was established pursuant to section 707(a)(1) of the Act without looking any further into the issue of need. Armstrong contends that the formula of Recommended Action 29.1.1.1(a) is not only the starting point in the ascertainment of need, it is also the end point. Accordingly, Armstrong argues, it has satisfied the need requirement of section 707(a)(1). We disagree.

We agree with the board's opinion wherein the board stated that the provisions of section 707 of the Act indicate that the need criteria of the State Health Plan are separate and distinct from the need requirement established by section 707(a)(1). Therefore, the mere fact that one or more of the exceptions in Recommended Action 29.1.1.1 may be applicable does not automatically

establish that a proposed facility meets the requirements of need under section 707(a)(1) of the Act. The language of section 707 of the Act supports this conclusion.

Section 707(a) of the Act clearly states that an application for a CON shall be considered for approval when the department determines that the application substantially meets the three requirements listed therein. 35 P.S. §448.707(a). The first requirement, which the board determined that Armstrong's CON application did not meet, is that "there is need by the population served or to be served by the proposed service or facility." 35 P.S. § 448.707(a)(1).

Section 707(b) of the Act provides that "[t]he department shall issue certificate of need if the project substantially meets the criteria of subsection (a)(1), (2), and (3) *and* the project is consistent with the State [Health Plan] . . . . 35 P.S. § 448.707(b) (emphasis added). Accordingly, when determining whether a CON application should be granted the department is required to determine whether the requirements of section 707(a) are substantially met and also to determine whether the project is consistent with the applicable portions of the State Health Plan. Therefore, if this court were to follow Armstrong's argument that the board was mandated to find that it substantially met the need requirement of section 707(a)(1) when the board determined that one exception found in Chapter 29 of the State Health Plan was applicable, this court would be permitting the board to ignore the provisions of the Act.

Armstrong relies on this court's recent decision in *Department of Health v. North Hills Passavant Hospital*, 674 A.2d 1141 (Pa. Cmwlth. 1996), to support its argument that the board was prohibited from applying its own concept of need after it determined that Recommended

Action 29.1.1.1(a) was applicable to the CON application. In *North Hills Passavant Hospital*, this court held that mandatory provisions of the State Health Plan should be treated as regulations which are binding on the board. 674 A.2d at 1147. In this context, this court noted that because the department considered the need formula stated in the State Health Plan for determining the number of open heart surgery facilities needed in a region mandatory, and the language of the State Health Plan stated that the formula was used to estimate need, the formula was a mandatory provision (although subject to stated exceptions in the plan). 674 A.2d at 1147 n.20.

In the present case, Recommended Action 29.1.1.1 of Chapter 29 of the State Health Plan does not contain language which would indicate that this provision of the State Health Plan should be treated as a binding regulation thereby prohibiting the board from conducting a further review with regard to the issue of need. Recommended Action 29.1.1.1 provides that further ambulatory surgical capacity *will* be considered for approval if certain exceptions are satisfied. The language of recommended action 29.1.1.1 does not state that the department must or shall make a finding of need if one of the exceptions listed therein is met.

As pointed out in *North Hills Passavant Hospital*, this court has previously recognized that the State Health Plan is a combination of both mandatory provisions and directory provisions. *North Hills Passavant Hospital*, 675 A.2d at 1146 (citing *Robert Packer Hospital v. Department of Health*, 631 A.2d 813 (Pa. Cmwlth. 1993) and *Morrisons Cove Home v. Department of Health*, 593 A.2d 925 (Pa. Cmwlth. 1991), *petition for allowance of appeal denied*, 529 Pa. 653, 602 A.2d 863 (1992). In *Morrisons Cove Home*, this court held that a "recommended action"

found in Chapter 39 of the applicable state health plan, providing that the department "will use" a specified table of nursing home bed need projections to determine whether need exists, in connection with certificate of need applications, did not preclude the department from also considering average occupancy rate of existing nursing homes. 593 A.2d at 929. This court held that the petitioners' reliance on the recommended action was misplaced for three reasons: (1) the provision was only a "recommended action" which by its very title was not obligatory; (2) the provision was only directive because it utilized the term "will" and did not use the mandatory term "must" or "shall"; and (3) the provision did not prohibit the department from using other information to determine need. *Id.*

Accordingly, we reject Armstrong's argument that it automatically established need under section 707(a)(1) of the Act by meeting the requirements of Recommended Action 29.1.1.1(a) of Chapter 29 of the State Health Plan. A review of the entire record herein reveals that the board's determination that Armstrong's CON application does not substantially meet the requirement of establishing need for the proposed facility by the population served or to be served in accordence with section 707(a)(1) of the Act is supported by substantial evidence. *See* R. at pp. 1a-854a. Moreover, our review of the record shows that the board's determination that the anticipated volume of ambulatory surgical procedures projected by Armstrong in connection with its CON application is not realistic or attainable under the existing circumstances is supported by substantial evidence. *Id.*

Next, Armstrong argues that the merits used by the board to deny the CON application violate the review mandate of section 202 of the Act, 35 P.S. § 448.202.

Armstrong argues that the board's "merits" do not foster competition to promote cost efficiency, quality and access to care. Individually and collectively, Armstrong contends, the board's findings have a common theme—they protect the hospital and those connected with it from competition by Armstrong. We disagree.

Section 202 of the Act provides that:

> The department shall in its planning and review activities foster competition to promote cost efficiency, quality and access to care. The department shall encourage cooperative health care arrangements which focus on the health care needs of a health planning area and foster the prudent and economical control of the area's resources. The department shall also encourage innovations in the financing and delivery systems for clinically related health services that will promote economic behavior by consumers and providers of clinically related health services that leads to appropriate investment in, supply and use of health services.

A review of Armstrong's arguments in support of its contention that the board's decision violates section 202 of the Act reveals that Armstrong is really challenging the board's weighing of the evidence presented. When reviewing an approval or disapproval of a CON application, the board is required to make findings of fact, including credibility determinations that resolve conflicts in the evidence, and then to make conclusions of law based on its findings of fact. *Mercy Regional Health System v. Department of Health*, 645 A.2d 924 (Pa. Cmwlth. 1994). Accordingly, it is well within the board's province, as fact finder, to weigh the evidence presented and to reject or accept the evidence based on credibility determinations.

As demonstrated by the board's decision and order, the board determined that the preponderance of the evidence supported disapproval of Armstrong's CON application. While this decision may appear to Armstrong to limit competition in the county, this court lacks the authority to overturn the board's decision if it is supported by substantial evidence. As we have previously stated in this opinion, a review of the entire record herein reveals that the board's decision is based upon substantial evidence.

/s/ James R. Kelley
JAMES R. KELLY
Judge

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 890 C.D. 1996

ARMSTRONG SURGICAL CENTER, INC.,
Petitioner

v.

PENNSYLVANIA DEPARTMENT OF HEALTH,
Respondent

ORDER

NOW, this 27th day of January, 1997, the order of the State Health Facility Hearing Board, dated March 13, 1996, at No. CN 93-029, is affirmed.

/s/ James R. Kelley
JAMES R. KELLEY
Judge

APPENDIX E

COMMONWEALTH OF PENNSYLVANIA
STATE HEALTH FACILITY HEARING BOARD

Docket No. CN 93-029

IN RE: ARMSTRONG SURGICAL CENTER, INC.

PROJECT NO. CON-90-H-9564-B

OPINION

This appeal concerns disapproval by the Department of Health (Department) of a Certificate of Need (CON) application proposing development of a freestanding ambulatory surgical center in East Franklin Township, Armstrong County. The facility would be operated by Armstrong Surgical Center, Inc. (Applicant) and would provide a wide range of outpatient surgical services.

The CON application was filed pursuant to the Health Care Facilities Act[1] (Act) and opposed by Armstrong County Memorial Hospital (Hospital). The Department held a public meeting at which the parties presented oral and documentary information. Ultimately, the Department disapproved the application and the Applicant appealed to this Board. We conducted a formal hearing

[1] Act of July 19, 1979, P.L. 130, No. 48, as amended, 35 P.S. § 448.101 *et seq.* The Act was amended after the CON application was submitted, but before the Department rendered its decision. Under the circumstances, the amended version of the Act applies to this appeal. *See, Robert Packer Hospital v. Dep't. of Health*, 158 Pa. Commonwealth Ct. 329, 631 A.2d 813 (1993).

on May 3 and August 31, 1995, after which the parties filed post-hearing briefs and reply briefs.[2]

FINDINGS OF FACT

1. On January 16, 1990, the Department received a letter proposing construction of an ambulatory surgical facility to be known as the "Kittanning Same Day Surgery Center" in Armstrong County. Certified Record (C.R.) 1-4.

2. The Department determined that the proposal required a CON and assigned it project number CON-90-H-9564-B. C.R. 5-7.

3. On March 11, 1991, the Applicant filed a CON application with the Department which, among other things, changed the name of the project to "Armstrong Surgical Center, Inc." C.R. 8-94.

4. The application described the project as a free-standing ambulatory surgical center in East Franklin Township, Armstrong County, having two operating rooms, a special procedure room and a dental room, C.R. 13, which would offer surgical services in specialties such as ENT, gastroenterology, general surgery, gynecology, ophthalmology, orthopedics and urology, C.R. 15.

5. On October 25, 1991, the Department sent questions to the Applicant, C.R. 95-97, to which the Applicant responded on June 4 and June 25, 1992, C.R. 98-175, 176-182.

6. On July 8, 1992, the Hospital replied to the Applicant's responses to the Department's questions. C.R. 183-200.

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[2] References to the Notes of Testimony (N.T.) pertain to the hearing conducted on May 3, 1995.

7. On August 12, 1992, the Department sent additional questions to the Applicant, C.R. 203-204, to which the Applicant responded on June 10, 1993, C.R. 205-210.

8. On December 18, 1992, amendments to the Act were signed into law by the Governor, effective immediately.

9. On July 31, 1993, the Department published a notice indicating that its preliminary assessment of the CON application had been completed. C.R. 214.

10. On October 7, 1993, the Department convened a public meeting in accordance with the provisions of the Act, at which time oral and written information was presented by various interested parties, including representatives of the Applicant and the Hospital. C.R. 242-297; 298-328; 329-347.

11. Subsequently, the Department received additional written information from the Hospital and the Applicant concerning the project. C.R. 350-385, 386-445, 446-453, 454-465, 472-483.

12. On November 17, 1993, the Planner assigned by the Department to review the CON application recommended disapproval thereof on grounds that the proposed project was not consistent with the State Health Plan criteria pertaining to ambulatory surgical services and did not substantially meet the requirements of Section 707 of the Act. C.R. 485-493.

13. By letter dated November 29, 1993, the Department officially informed the Applicant that its CON application was disapproved. C.R. 494-501.

14. The Applicant filed a timely appeal with this Board which was formally heard on May 3 and August 31, 1995.

15. The Hospital is the only health care facility located in Armstrong County. C.R. 26, 486.

16. The Hospital had six operating rooms in service at the time of the Department's decision. C.R. 486.

17. In the CON application, the Applicant projected need for approximately seven operating rooms by the year 2000. C.R. 26.

18. Employing actual utilization figures for the current and projected population, the need-projection formula in Chapter 29 of the State Health Plan indicates that 6.5 operating rooms are needed in Armstrong County. C.R. 488; N.T. 180.

19. The need-projection formula found in Chapter 29 of the State Health Plan indicates need for more operating rooms in Armstrong County than currently exist.

20. In the CON application the Applicant equated its service area with that of the Hospital and suggested that only data from Armstrong County should be considered by the Department in its analysis. C.R. 21.

21. At the public meeting, the Applicant stated a belief that all of its patients would be likely to come from Armstrong County. C.R. 284.

22. According to the Applicant, a majority of the physicians who would utilize the proposed facility are members of the staff of the Hospital. C.R. 101; N.T. 179, 184.

23. The proposed facility would be located in the immediate vicinity of the Hospital and would serve essentially the same population as the Hospital currently serves. C.R. 206; N.T. 179, 185, 195.

24. In addition to having six operating rooms, the Hospital has a room used for procedures such as endo-

scopies, colonoscopies and sigmoidoscopies which has been in service since at least 1991. N.T. 278-279.

25. The Hospital has partially completed construction of a building on its premises that would house a dedicated outpatient surgical facility. N.T. 126, 282-284.

26. Upon completion of the Hospital's outpatient surgical facility, three of its existing operating rooms would be moved into the new building. C.R. 364.

27. The proposed ambulatory surgery center and the one which has been partially constructed by the Hospital would serve the same population and would provide essentially the same surgical services. C.R. 206; N.T. 179-180, 184-185, 195.

28. The Applicant's proposed ambulatory surgery center would needlessly duplicate existing facilities and health care services in Armstrong County.

29. Estimates concerning the number of surgical procedures that a proposed ambulatory surgical facility reasonably expects to perform are vital to the resolution of issues such as need, utilization, cost, and financial feasibility. C.R. 492-493; N.T. 222-223.

30. The Applicant projected that 3,029 procedures would be performed at the proposed facility during the first year and that 4,420 procedures would be performed in the fifth year. C.R. 29.

31. Historical data supplied while the application was under consideration by the Department showed that ambulatory surgery in Armstrong County grew by only 27 percent during the preceding five-year period. C.R. 108.

32. The Applicant sought to justify its five-year growth projections by asserting that the facility would attract

patients from Indiana, Westmoreland, Allegheny and Butler Counties, C.R. 108-109.

33. Existing ambulatory surgical facilities in Allegheny and Westmoreland Counties are accessible to patients in Armstrong and other neighboring counties. C.R. 493.

34. The Applicant sought to justify its five-year growth projections by asserting that the proposed facility and would perform certain surgical procedures not currently provided by the Hospital, such as radioactive seeding of the prostate gland, lithotripsy and laser treatment of kidney stones, C.R. 206-207, 457-458.

35. Although radioactive seeding of the prostate gland requires, among other things, specially-certified personnel, a nuclear medicine license and a storage facility for radium, N.T. 49-50, the costs associated with these items were not included in the CON application. N.T. 227.

36. The cost of laser surgery equipment was not included in the CON application. C.R. 71-82; N.T. 51, 210-211, 214-215.

37. The Applicant submitted to the Department of letters from 17 physicians who indicated that they would perform approximately 3,475 surgical procedures per year at the proposed facility. C.R. 155-182.

38. Five of the 17 physicians later withdrew their support and recommended disapproval of the application. C.R. 334, 336-337, 340, 343.

39. Fourteen physicians who had not initially supported the project stated that they would utilize the outpatient surgical facilities at the Hospital and that they would not perform any surgery at the proposed facility. C.R. 329-333, 335, 338-339, 341-342, 347.

40. The five physicians who withdrew their support and the fourteen physicians who indicated that they would not use the proposed facility perform approximately 90 percent of all surgery at the Hospital. C.R. 268, 329-347.

41. All five of the physicians who withdrew their support and all fourteen of the physicians who indicated that they would not use the proposed facility are on the staff of the Hospital. C.R. 329-347.

42. The Hospital provided the Department with the historical volume of outpatient surgery performed by physicians on its staff, N.T. 225, which was much lower than the volume projected by the Applicant for those physicians. N.T. 232-233, 241-242.

43. In order to meet its volume projections, a large amount of the Applicant's surgical volume would necessarily have to come from patients who reside outside of the primary service area and from patients residing in the primary service area who currently "migrate" elsewhere for ambulatory surgery. C.R. 493; N.T. 225-227.

44. CON review requires that a project should be viable and have a reasonable chance of success. N.T. 239-240.

45. There is insufficient potential in Armstrong County to support the Applicant's volume projections. N.T. 235, 239; 241.

46. The Applicant's volume projections are inconsistent and unpersuasive, and the volume of surgical procedures likely to be performed at the proposed facility is not sufficient to support a finding of need for two additional operating rooms in Armstrong County. C.R. 493.

47. The possibility that the proposed facility would have a negative impact on the Hospital was not adequately addressed in the CON application. N.T. 265-267.

DISCUSSION

In an appeal from a decision of the Department involving a CON applicaiton, this Board is required to determine whether the preponderance of credible evidence supports approval or disapproval of the application. *Mercy Regional Health System v. Department of Health*, 165 Pa. Commonwealth Ct. 629, 645 A.2d 924 (1994). Where appropriate issues are raised, we will also review the record for violations of the Act, for non-compliance with administrative regulations and for prejudicial procedural errors committed during the review process.[3] 37 Pa. Code § 197.45(a).

Under a preponderance of evidence standard, the existence of a fact must appear more probable than not before a finding may be made in favor of the party with the burden of proof. *Sigafoos v. Commonwealth Board of Probation and Parole*, 94 Pa. Commonwealth Ct. 454, 503 A.2d 1076 (1986). In appeals from decisions of the Department concerning CON applications, the appellant bears the burden of proof. 37 Pa. Code § 197.48(a); *In re: Health Systems Council of Eastern Pennsylvania*, 1 S.H.F.H.B. 75 (1983).

Among other things, Section 707(b) of the Act[4] prohibits the Department from issuing a CON for a proposed project which is not consistent with requirements of the

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3 Subsequent to promulgation of 37 Pa. Code § 197.45(a) it was determined that this Board does not have jurisdiction to decide constitutional issues. *See, In re: Lee Hospital*, 3 S.H.F.H.B. 76 (1986).

4 35 P.S. § 448.707(b).

State Health Services Plan.[5] Recommended Action 29.1.1.1 (Department Exhibit 2), which is part of Chapter 29 of the State Health Plan (SHP), indicates that a finding of "no need" should be made for any proposal which would result in a supply of operating rooms greater than the amount specified in Table 29-2, except that further ambulatory surgical capacity will be considered for approval if one of the following applies: (1) the need-projection formula in Chapter 29 indicates that additional operating rooms are needed in a sub-area; (2) existing opearting rooms are being utilized at full capacity and need for at least one full-time operating room is shown; (3) the proposal represents a less costly and more effective alternative to inpatient surgery which does not inappropriately increase the total cost of health care to the community.

The department's planner applied the need-projection formula in Chapter 29 and determined that 6.5 operating rooms were needed in Armstrong County, based upon projected population for 1995 and utilization rates for 1990, C.R. 488; N.T. 180, and the Applicant projected need for seven opearting rooms by the year 2000, C.R. 26. It is undisputed that the Hospital, which is the only health care facility in Armstrong County, had six operating rooms at the time of the Department's decision. Inasmuch as the formula shows projected need for more than six operating rooms, we find that the first exception is applicable. In accord with the express language of Recommended Action 29.1.1.1, further inquiry into the merits of the application is required.[6]

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[5] The Department's decision was rendered prior to adoption of the State Health Services Plan. In such cases, the Act requires review of CON applications under the State Health Plan. 35 P.S. § 448.201(6).

[6] In view of our finding that the first exception applies, it is unnecessary to address applicability of the other exceptions. We note

Section 707(a) of the Act[7] provides that a CON application shall be considered for approval if it substantially meets the following requirements: (1) there is need for the facility by the population served or to be served; (2) the facility will provide care consistent with quality standards established by the SHP; and (3) the facility will meet the SHP standards for access to services by medically underserved groups.[8] Among other things, the Department found that the application was not consistent with Section 707(a)(1). The preponderance of evidence presented to this Board supports the Department's conclusion. For the reasons set forth below we find that inasmuch as the application does not establish need for the proposed facility by the population to be served as required by Section 707(a)(1) of the Act, it must be disapproved.

The introductory language in Section 707(b) indicates that the need criteria of the SHP are separate and distinct from the need requirement established by Section 707 (a)(1). The mere fact that one or more of the exceptions in Recommended Action 29.1.1.1 applies does not automatically establish that a proposed facility is needed under Section 707(a)(1) of the Act. *In re: St. Clair*

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in passing, however, as the Applicant correctly pointed out in its post-hearing reply brief, that the accountant's report prepared *on behalf of the Hospital* found over-utilization of its OR's even after the sixth operating room had been opened, and the cost savings projected in the application ($400 per case) were close to the average range of savings documented by the Applicant upon examining the Hospital's reimbursement records.

[7] 35 P.S. § 448.707(a).

[8] There is no serious contention that the CON application does not meet the criteria in subsections 707(a)(2) and (a)(3) of the Act, 35 P.S. § 448.707(a)(2) and 707(a)(3). In any event, we find that those requirements have been substantially met.

Memorial Hospital, —— S.H.F.H.B. —— (CN 94-009, issued December 13, 1995). An inquiry under Section 707(a)(1) requires us to go beyond mere examination of the quantitative need criteria set forth in the SHP. *In re: Keystone Kidney Center*, —— S.H.F.H.B. —— (CN 94-008, issued August 3, 1995). There are many facets to the issue of need, and we are required to consider all relevant factors prior to authorizing construction of additional health care facilities. *Mechanicsburg Rehab System v. Pa. Department of Health*, 165 Pa. Commonwealth Ct. 358, 645 A.2d 372 (1994); *In re: St Clair Memorial Hospital, supra.*

The project would be located in the immediate vicinity of the Hospital. C.R. 21, 206; N.T. 179, 185. As set forth below, the Applicant has contended that its service area would cover a larger geographic region than the Hospital covers. However, the Applicant itself equated its proposed service area with that of the Hospital in the application when it suggested that statistics from Indiana County should be excluded from the Department's analysis. C.R. 21. The Applicant also stated that a majority of physicians who would perform surgery at the proposed facility are on the staff of the Hospital. C.R. 101; N.T. 179, 184. We find that the facility would serve essentially the same population as the Hospital currently serves.

The application proposes to add two operating rooms under circumstances where the SHP need-projection formula indicates, at most, need for one additional (seventh) operating room, N.T. 191-192. In addition to having six general purpose operating rooms, the Hospital has a room that is used for "short procedures" such as endoscopies, colonoscopies and sigmoidoscopies. N.T. 278-279. Although outpatient surgery at the Hospital is now performed in the same operating rooms as inpatient surgery,

the Hospital has partially[9] completed construction of a building on its premises to house a dedicated outpatient surgery facility. N.T. 126, 282-284. Upon completing construction, the Hospital would move three existing operating rooms into the new building. C.R. 364.

With regard to the population to be served and the surgical services to be offered, there would be little difference between the Applicant's ambulatory surgical center and the one that the Hospital has partially completed, except that the Applicant's project would raise the number of operating rooms in Armstrong County above the limit set by SHP. We conclude that approval of the instant CON application would result in needless duplication of existing facilities and health care services.

We believe that the factors set forth above, in themselves, are sufficient to support a finding that the Applicant has failed to establish need for the proposed facility by the population to be served. In this case, however, it is possible that even the considerable weight of those factors might have been overcome by credible evidence that the proposed facility could reasonably be expected to generate a sufficient volume of surgical procedures to assure its financial stability—while maintaining a low-cost pricing structure and providing the required access to medically underserved groups—without jeopardizing the continued viability of the Hospital which is the only health care facility located in Armstrong County. Unfortunately for the Applicant, its volume projections are neither consistent nor convincing.

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[9] Apparently, after construction of the building and some of the interior walls had been completed, N.T. 283, staff physicians at the Hospital began to question whether a separate outpatient facility was necessary. Although the building is currently being used as a storage facility, there was credible evidence that the project has not been abandoned. N.T. 126, 283.

In reviewing applications for ambulatory surgery facilities, volume projections are vital to the resolution of issues relating to need, utilization, cost and financial feasibility. C.R. 492-493; N.T. 222-223. The Applicant predicted that 3,029 surgical procedures would be performed at its facility in the first year and 4,420 procedures would be performed in the fifth year, which represents total growth of 46 percent over five years. C.R. 29. However, historical data supplied while the application was under consideration by the Department showed that ambulatory surgery in Armstrong County grew by only 27 percent during the preceding five-year period. C.R. 108. The Applicant attempted to explain the rather significant discrepancy by relying in part [10] upon an assumption that it will attract patients from a larger geographic area than the Hospital. C.R. 109. Not only is that assumption inconsistent with the Applicant's statement that Armstrong County would be the relevant service area, C.R. 21, 284; N.T. 180-182, but its positive effect on the projected growth is also dampened by the fact that there are several ambulatory surgery facilities located nearby in Allegheny and Westmoreland Counties. C.R. 493.

The Applicant also sought to bolster its volume projections by asserting that it would perform certain types of surgery using technology that currently is not available at the Hospital (such as radioactive seeding of the prostate gland, lithotripsy and laser treatment of kidney stones) in order to attract additional patients. C.R. 206-207, 457-458. However, the seeding procedure requires consid-

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[10] The Applicant also cited scientific and economic factors in support of its high growth projections. The scientific factor is equally applicable to the Hospital's ambulatory surgery facility. Although the economic considerations are apt, they are somewhat tempered by the fact that the Hospital is a very low cost health care provider. C.R. 187; N.T. 213.

eration of the cost of having staff members and other resources specially available for expensive and carefully-regulated radiation medicine activities,[11] N.T. 49-50, 227; the application does not include the cost of laser surgery equipment, C.R. 71-82, and lithotripsy requires an additional CON for which the Applicant has not applied. N.T. 227.

Although each problem area described above adversely affects the reliability of the Applicant's volume projections, the most damaging evidence is that the number of physicians who might have been expected to support the facility decreased significantly after the Applicant had submitted its projections. C.R. 493. At the outset of the review process, seventeen physicians provided letters of support for the proposed facility, C.R. 155-182, and the Applicant stated that a majority of physicians who would perform surgery at the facility were on the Hospital's staff. C.R. 101; N.T. 179, 184. Later, five of the seventeen physicians not only withdrew their support but also recommended disapproval of the CON application. C.R. 334, 336-337, 340, 343. Another fourteen physicians (who had not initially supported the project) stated that they would utilize the Hospital's outpatient surgical services and would not operate at the proposed facility. C.R. 329-333, 335, 338-339, 341-342, 347. The nineteen physicians who opposed the project in writing are responsible for approximately 90 percent of all surgery[12] per-

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11 The procedure would also require a nuclear medicine license and a storage facility for radium, neither of which was included in estimating the cost of the project. N.T. 49-50, 227.

12 We note that the record does not contain an estimate of the percentage of *outpatient* surgery represented by the 19 physicians who indicated that they would not perform surgery at the proposed facility. Nevertheless, this fact does not dissuade us from the conclusions which we have reached.

formed at the Hospital, C.R. 268, 329-347, and each is on the Hospital's staff. C.R. 329-347.

In other words, after the application was submitted (and for whatever reason) support for the facility eroded among physicians who either had supported it initially or were being counted upon for their eventual participation. Because the Applicant would therefore have to generate much of its volume from outside the service area or from patients who reside in the service area but currently "migrate" to other locales from ambulatory surgery, we seriously doubt that the volume projections made for the facility can be achieved.[13] C.R. 280-281; N.T. 231. We find that the volume of procedures likely to be performed at the proposed facility is insufficient to support a finding of need for two additional operating rooms in Armstrong County.

Inasmuch as the preponderance of evidence shows clearly that there is an absence of need for the proposed ambulatory surgical facility by the population to be served, Section 707(a)(1) of the Act does not permit further consideration of the project proposed by the Applicant. Accordingly, the decision of the Department must be affirmed, and the appeal must be dismissed.

CONCLUSIONS OF LAW

1. The exception contained in Recommended Action 29.1.1.1(a) of Chapter 29 of the State Health Plan is applicable to the Certificate of Need application filed by Armstrong Surgical Center, Inc., at CON-90-H-9564-B.

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13 Although the Applicant did reduce and otherwise adjust some of its volume projections throughout the review process, we are not convinced that even the most recent estimates are attainable.

2. The Certificate of Need application filed by Armstrong Surgical Center, Inc., at CON-90-H-9564-B does not substantially meet the requirement of establishing need for the proposed facility by the population served or to be served in accordance with Section 707(a)(1) of the Health Care Facilities Act.

3. The anticipated volume of ambulatory surgical procedures projected by Armstrong Surgical Center, Inc., in connection with the Certificate of Need application at CON-90-H-9564-B is not realistic or attainable under the existing circumstances.

4. The Certificate of Need application filed by Armstrong Surgical Center, Inc., at CON-90-H-9564-B must be disapproved.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
STATE HEALTH FACILITY HEARING BOARD

Docket No. CN 93-029

IN RE: ARMSTRONG SURGICAL CENTER, INC.

PROJECT NO. CON-90-H-9564-B

ORDER

AND NOW, this 13th day of February, 1996, the decision of the Pennsylvania Department of Health as to Project CON-90-9564-B is affirmed and the appeal of Armstrong Surgical Center, Inc., is dismissed.

/s/ Paul J. Carey, Jr.
PAUL J. CAREY, JR.
Chairman

/s/ Thomas A. McGoff
THOMAS A. MCGOFF

/s/ Bruce Davidson
BRUCE DAVIDSON, M.D., M.P.H.

/s/ Cornelia Swinson
CORNELIA SWINSON

Date of Mailing: 3/13/96